IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Cockar, Omolo & Tunoi JJ A)

CIVIL APPLICATION NO. NAI 264 OF 1993 (NAI 114/93 UR)

BETWEEN

1. NYAMODI OCHIENG NYAMOGO

2. MICHAEL S.G. NJERU.....APPLICANTS

AND

KENYA POSTS & TELECOMMUNICATIONS CORPORATION.....RESPONDENT

(Application for committal arising out of an injunction in an intended appeal from a ruling of the High Court of Kenya at Nairobi (Hon Lady Justice Owuor) dated 4th August, 1993,

in

HCCC Nos 1736 & 1890 of 1993 (consolidated)

****

RULING

On 8th October, 1993, this Court, comprised of a different bench, made an order (hereafter referred to as the order) restraining the respondent corporation from retiring the two applicants from its service or otherwise interfering with their employment until the hearing and final determination of their intended appeal or further order.

The second part of the order is not relevant to these contempt proceedings because this court's order restraining the Corporation from evicting the two applicants from the Post Office staff quarters occupied by either until the final determination was complied with and both the applicants are still in occupation of the said Post Office staff quarters.

On 28th October, 1993, M/S Khaminwa & Khaminwa, Advocates, filed on behalf of the two applicants, a notice of motion under a certificate of urgency seeking an order for committal to prison of the then corporation's Managing Director Mr Ngeny, the Corporation Secretary Mr David Malakwen, and the Acting General Manager (Business Studies) Fredrick Odhiambo Josiah on grounds that they were refusing to obey the court order. There was only one accompanying affidavit in support and that was by Nyamogo, the 1st applicant. The detailed acts of refusal are deponed to therein. What in effect they amount to is that the 1st applicant on advice of his advocates reported on duty on 12th October, 1993, but was not allowed to resume his normal duties by his immediate Controlling Officer the said Mr Josiah and

in consequence he was being kept unemployed. On 25th October, 1993, at about 2.10 pm the said Mr Josiah had confirmed to him that a process server had been in his office with a formal order in the morning and that he had told the process server that he did not deal with court documents.

The motion was fixed for hearing on 17th November, 1993, but on account of some confusion of the hearing date on the part of the Corporation's advocates the hearing could not proceed on that date. The motion was then fixed for hearing for 1st December 1993. A day before that, that is on, 30th November, 1993, under some procedure unknown to this Court but perhaps known only to M/S Khaminwa & Khaminwa, which was disclosed to us, an affidavit sworn by the 2nd applicant on the same day was filed. Perhaps it was supposed to be his affidavit in support of the

motion but in case of such an omission there is a proper procedure to bring an omitted document into the file. On 1st December, 1993, when the hearing started Mr Khaminwa made an oral application for the motion to be heard by the same bench which had granted the order. Lengthy submissions by advocates on both sides were made and on 15th December 1993, we delivered our ruling rejecting the application. At the same time we ordered for the hearing to be fixed during the civil sessions in the new term. Thereafter instead of fixing the hearing date of this motion which had been filed under a certificate of urgency, M/S Khaminwa & Khaminwa, fixed it for mention on 5th October, 1994, which was almost a year after the filing of this application. At the insistence of Mr Lakha who was the leading advocate for the Corporation the Court then fixed the hearing for 31st October, 1994.

When the hearing started on 31st October, 1994, Mr Khaminwa first made an application for two of the three judges who constituted the bench to disqualify themselves on the ground that the said two judges were part of the "five judge" bench who had dealt with the *University Don's* appeal and in which the five judge bench, after commenting that the decision in Nyamogo application (which is the basis of the instant application) was a pious farce, had found that the same was clearly wrong and should not be followed. Mr Khaminwa feared that the said two judges would not approach the contempt application with fresh or unbiased minds. Somewhat lengthy submissions from advocates for both parties followed. Thereafter this Court gave its ruling dismissing the application calling for the said two judges to disqualify themselves.

Mr Khaminwa's main contention in support of his application for committal was that, despite the decision of the five judge bench in the *University Don's* case to the effect that the decision in *Nyamogo's* case was wrong and not to be followed, injunctive order made by this Court on 8th October, 1993, was vibrant and lawfully entitled to obedience by those against whom it was directed. The decision in the *University Don's* case had neither discharged the said order of 8th October 1993, nor affected it in any derogatory manner at all. In a partial compliance with the first part of the order the applicants had been paid salaries for 3 months of April, May and June, 1993. But the applicants had been kept out of their office rooms and were not being allowed to work at all. Mr Khaminwa very strongly urged for the said three officials of the Corporation to be punished for contempt.

Mr Lakha addressed us on three points in response to Mr Khaminwa's submissions:

1. There was no evidence of service of the order

2. Neither the order nor the notice of motion nor any other notice in connection therewith that was served carried an indorsement of penal obligation or consequence.

3. The order in question was not capable of being enforced or being complied with.

With regard to absence of evidence of service of the order it is not disputed that no evidence to that effect is annexed to the affidavits in support of the motion. That omission in view of the position in law to which we will revert in due course was fatal but, despite Mr Lakha's objection and in the interest of justice, we received the original documents preferred by Mr Nowrojee during the hearing on behalf of the applicants, as evidence relating to the service of the order that was effected on the said officials.

These documents consist of the following:

1. Two copies of the order dated 8th October, 1993, and extracted on 22nd October, 1993.

2. Two copies of a notice dated 27th October, 1993, addressed to the respondents to the effect that it was intended to make an application to the Court of Appeal under the provisions of section 5 of the Judicature Act for them to show cause why they should not be punished for contempt of the Court of Appeal for refusing to obey the orders of the said Court. There was an endorsement on either notice that it was to be served upon M/S Wetangula & Co Advocates.

3. Two copies of the letter dated 27th October, 1993, from the offices of M/S Khaminwa & Khaminwa, Advocates, addressed to the three respondents, and copied to M/S Wetangula & Co forwarding the above notice.

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 …"

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.

Of these two orders only one bears the office stamp of the office of the corporation's secretary and the signature of Mr Malakwen, the Corporation Secretary. There is no evidence at all of the person who served Mr Malakwen on 3rd November, 1993. It is to be observed that application for committal to prison was filed on 28th October, 1993 – 6 days before the purported service of the order. Absence of a return of service by the person who effected service – there is no evidence as to whether he was an authorised process server, is enough to render service of the order on 3rd November, 1993, of no effect. However, in his replying affidavit sworn on 16th November, 1993, and filed on the same day Mr Malakwen states and we quote:

"I have now seen the notice of motion dated 28th October, 1993, and an affidavit sworn by one Mr Nyamodi Ochieng Nyamogo annexed thereto."

So even if we accept that Mr Malakwen was served with the order on 3rd November, 1993, is that service of any legal effect as far as those committal proceedings filed on 28th October, 1993, that is 6 days prior to service of the order, are concerned? We are satisfied that for the purposes of the committal proceedings filed on 28th October, 1993, praying for Mr Malakwen to be committed to prison for contempt of the order which was served on him 6 days later was of no legal effect. How can this Court in this application filed on 28th October, 1993, find Mr Malakwen guilty of contempt of an order which had not been served on him prior to the filing of the application? We are satisfied that Mr Malakwen was not served with the order in such a manner as would render him subject to committal order prayed in the committal proceedings filed on 28th October, 1993.

Coming now to the question of service of the order on Mr Fredrick Odhiambo Josiah, apart from the absence of a return of service made by the process server, there is no evidence on either of the two copies of the

order that either of them was served on him or received by him. Mr Josiah in his replying affidavit sworn on 16th November, 1993, and filed on the same day has stated that he was never served with any court order or at all in regard to this matter.

Likewise there is nothing to show on either of the 2 copies of the order that either of the two was served on Mr Ngeny, the then Managing Director of the Corporation, nor is there any return of service to show that Mr Ngeny was served with the order. We are satisfied that neither Mr Ngeny nor Mr Josiah was served at all with the order either prior to or after the filing of the application of these committal proceedings. This application as far as these two are concerned must be dismissed on the ground of lack of service. With regard to service on Mr Malakwen, in our view, this application is incompetent and must be struck out on the ground that at the time when the application was filed Mr Malakwen had not been served with the order which it is claimed therein he had disobeyed.

Apart from this non-compliance with an elementary but mandatory procedural rule which in contempt proceedings has prescribed "personal service", 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:

"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."

Mr Nowrojee for the applicants referred us to the later decision of this Court in Civil Appeal No NAI 39/1990 *Refrigerator & Kitchen Utensils Ltd v Gulabchand Popotlal Shah & Others & Shanti Lal Khetshi Shah & Others*. Incidentally two of the judges of appeal who were in the bench which dealt with Shahs' contempt application were also in the bench which had earlier heard *Wangondu's* appeal. In *Shah's* case the Court on 23rd May, 1990, granted an interim order staying execution of the order of

eviction pending hearing of the application *inter partes* on Friday 25th May, 1990, at 9.00 am. As the hearing of the application was not concluded on 25th May, 1990, the interim order was extended until the final disposal of the application. The matter came up for mention on 8th June, 1990, and stay order was extended "until further order of this Court." On each of the above occasions when the stay order was first made and subsequently extended from time to time the advocates for the respondents (contemnors) were present. It is, however, not clear whether the respondents (contemnors) were or any of them was present in Court on any of these occasions. But it was never suggested by their advocates that the contemnors were unaware of what they were required or expected to do under the terms of the order. When non-compliance with the mandatory requirement of indorsement of

penal consequence on the order was pointed out to the Court the learned judges of appeal after accepting the law on the question as laid down in the case of *Wangondu (supra)* continued:

"That is the law but the short answer to Mr Hira's submission on this precise point is that when the application came up for the first time on 5th July, 1990, and it was discovered by the Court upon inquiry that the respondents had only been served once with the original order, the Court adjourned the proceedings and made an order that a certified copy of the order be served a second time on each and every respondent. Service was effected accordingly and returns of service have been filed in Court. In view of this neither the respondents nor their advocates can be heard to say that they were unaware that an application was being made for their committal for disobedience of the court order. This submission which was also adopted by Mr Ransley on behalf of Mrs Khanna has therefore no substance."

The circumstances in *Shah's* case may or may not be different from those existing in *Wangondu's* case. But with respect to the decision in *Shah's* case we prefer to follow the decision in *Wangondu's* case because it has followed the English law and procedure on the issue. It is clear that the law in England does not render a mere knowledge of all the terms and directions of the court order and a disobedience thereof by an alleged contemnor as being enough to commit him for contempt. A further essential step is needed to be taken in the shape of indorsement of the penal consequence on the order served on the alleged contemnor. That is what this Court held in its decision in *Wangondu's* case and that is what we now hold.

The learned judges in *Shahs'* case appear to have been concerned only with service of the order upon the Shahs. They did not refer at all to the issue of what type of order had been served on them ie whether the order contained the necessary endorsement of penal consequences. With respect this issue could not be overcome by simply stating that the Shahs were aware of what the order required them to do. *Wangondu's* case decided by the same Court had correctly set out the requisite procedural steps to be taken before a party could be called upon to answer a charge of disobedience of a court's order. 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. It is for these reasons that we would prefer *Wangondu's* case over the *Shahs'* case. 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.

On the issue of the order not being capable of enforcement it is to be noted that the order was granted on 8th October, 1993. In paras 2 and 3 of the replying affidavit of Mr Josiah, the Acting General Manager (Business Studies) sworn on 11th November, 1993, and filed on the same day it is deponed that the 1st applicant ceased to be an employee of the Corporation on 7th April, 1993, and that his office was abolished when he was retired. Mr Malakwen, the Corporation Secretary, in his replying affidavit sworn on 16th November, 1993, and filed on the same day also has deponed to the same effect adding:

1. That the 1st applicant's previous office was abolished by the Board of the Corporation (para 9).

2. That by 13th April, 1993, when the applicants filed the suit there was nothing left to injunct and that

the compulsory retirements already effected by the Board were done vide regulations promulgated under Kenya Posts & Telecommunication Corporation Act cap 411 Laws of Kenya (paras 11 and 12)

3. That neither the Managing Director nor he had any authority to override the decision of the Board (para 10).

Mr Nowrojee's contention was that the offices of the applicants were not abolished by then. He relied mainly on the fact that the applicants had been paid salaries for the months of April, May and June, 1993. In para 11 of his affidavit sworn on 28th October, 1993, in support of the application filed on the same date Mr Nyamodi has deponed that he had not been paid salary for the months of August, September and October, 1993. That meant that he had been paid up to the end of July, 1993. We are unable to attach any value to this as evidence of the offices of the applicants not having been abolished by October, 1993. In response to a clarification sought by the Court Mr Nowrojee informed us that Amin, J had on 13th April, 1993, granted an order for status quo to be maintained. It is clear that the salary was continued to be paid on account of that order because on 4th August, 1993, Lady Owuor, J made an order discharging the injunction that had been granted and dismissed the application that had been filed in the High Court seeking an injunction to restrain the Corporation from retiring the

applicants. Payment of salary being stopped from August, 1993, must have followed the aforesaid decision of Lady Owuor, J.

The claim in the afore-mentioned two affidavits of Mr Malakwen that the office of the two applicants was abolished on 7th April, 1993, is not controverted by any further affidavit evidence on behalf of the applicants. In fact in his affidavit sworn on 30th November, 1993, and placed in the file without the court's leave on the same day, the 2nd applicant has not deponed in any way with regard to this particular deposition that their offices were abolished on 7th April, 1993. That being so the order obtained six months later on 8th October, 1993, seeking to restrain the Corporation is clearly not capable of being enforced. It was conceded on behalf of the applicants that both the applications before the High Court which had been refused and had thereby given rise to the appeal forming the basis of an application before the 3 judge bench, had sought an injunction to restrain only and not a mandatory injunction for a reinstatement. It is clearly wrong to accuse or punish the officials of the Corporation for failing to comply with an order to restrain from retiring six months after the offices had been officially abolished. This notice of motion seeking committal for contempt of this court's order must fail on this ground also. In the final analysis this application seeking the three respondents to be committed for contempt of court must fail.

Mr Lakha for the respondents has applied for the discharge of the order made by this Court on 8th October, 1993, in Civil Application NAI 204 of 1993 *Ochieng Nyamogo & Another v Kenya Posts & Telecommunications Corporation* which was the basis for this application. The ruling was discussed at length by the 5 judge bench in the Court of Appeal Civil Application No NAI 20 of 1994 (12/94 UR) *Eric v J Makokha & 4 Others v University of Nairobi & 2 Others*. In a unanimous ruling the five judges over-ruled the ruling in *Nyamogo* application. They found that a court of equity would regard the order of 8th October, 1993, by the 3 judge bench in *Nyamogo* application as a pious farce. Mr Lakha contended that the order based on a decision which has been found to be a wrong decision ought not to be allowed to remain alive and must be discharged immediately to prevent it being put to any further misuse. There was no worthwhile response from the advocates for the applicants. This Court obviously has jurisdiction to discharge its own order of injunction or stay. We feel that in order to stop a repetition of a similar application based on that order coming up in future the order must now be discharged. We dismiss the application filed on 28th October, 1993, seeking for the committal of the three respondents for contempt of the court and we also declare the order dated 8th October, 1993, granted in Civil Application NAI 204 of 1993

to be discharged under rule 56(2) of the Court of Appeal Rules. Costs of this application are awarded to the respondents against the applicants jointly and severally.

A certified copy of this order shall be placed in the file of Civil Application NAI 204 of 1993.

Dated and Delivered at Nairobi this 13th day of January 1994.

A.M.COCKAR

.....

JUDGE OF APPEAL

R.S.C.OMOLO

.....

JUDGE OF APPEAL

P.K.TUNOI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the

original.

DEPUTY REGISTRAR