

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CONSTITUTIONAL, HUMAN RIGHTS & JUDICIAL REVIEW**  
**DIVISION**  
**APPLICATION NO. E006 OF 2024**

REPUBLIC.....APPLICANT

-VERSUS-

**KENYA WATER & SANITATION PROGRAM**

**MINISTRY OF WATER & SANITATION.....1<sup>ST</sup> RESPONDENT**

**MINISTRY OF WATER & SANITATION.....2<sup>ND</sup> RESPONDENT**

**PRINCIPAL SECRETARY**

**MINISTRY OF WATER & SANITATION.....3<sup>RD</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

*ex parte;*

**BARRACK APINDI OLILO**

**RULING**

1. On 28 March 2025, this Honourable Court granted an order for mandamus compelling the 3<sup>rd</sup> respondent to settle the applicant's decree in terms of a certificate of order against government issued on 18 January 2024. The applicant was also awarded costs of the suit. The order was served on the 3<sup>rd</sup> respondent in April 2025 but to date the decree has not been settled.
2. Inevitably, the applicant has initiated contempt of court proceedings against the 3<sup>rd</sup> respondent. The proceedings are by way of a motion dated 7 May 2025 expressed to have been brought under section 3A and 63 (e) of the Civil Procedure Rules. To be precise the applicant has asked for orders:

***“1. That the honourable court be pleased to order the 3<sup>rd</sup> respondent to personally attend court to show cause why he***

*should not be convicted for being in contempt of court, having blatantly disobeyed the honourable court's orders given on 28th march 2025 vide a decree issued thereof on 11<sup>th</sup> April 2025.*

*2.That the honourable court be pleased to order that the 3rd respondent having willfully and deliberately disobeyed this honourable court's orders given on 28th march 2025 vide a decree issued thereof on 11<sup>th</sup> April 2025, he be given an appropriate conviction of six (6) months' civil jail imprisonment and/or in addition any other satisfactory punishment as the court may deem fit in the circumstances.”*

The applicant has also sought an order for costs.

The application is supported by the affidavit of Barrack Apindi Olilo.

3. In response to the application, Mr. Julius Korir, the 3<sup>rd</sup> respondent has sworn a replying affidavit in which he has acknowledged having been served with the order he is alleged to be in contempt of. In particular, he has sworn, *inter alia*, that:

*“...I am aware of the order of mandamus that was issued on 28<sup>th</sup> March, 2025 compelling me to pay a decretal sum amounting to Kshs. 5,815,680/= together with a 12% interest per annum from 16<sup>th</sup> May, 2023 together with costs of Kshs.418,907/= to the applicant.”*

4. The 3<sup>rd</sup> respondent has stated he has not deliberately neglected or refused to comply with the court's order but that he has taken steps to comply and; as a matter of fact, on 28 March 2025, he wrote to the National Treasury requesting for funds to satisfy the decree. According to Korir, the Ministry had no provision to settle the decretal amount and it is for this reason that he has written to the National Treasury for funds.

I have considered the submissions by the respective learned counsel for the applicant and the 3<sup>rd</sup> respondent.

5. Disobedience of a court order or judgment is the foundation for contempt of court proceedings against the contemnor. It is, therefore, a necessary prerequisite that before one is held to be in contempt it must be demonstrated that he was aware of the order or judgment he is alleged to be in contempt of. In other words, proof of service of the order or judgment is necessary unless, for reasons to be stated, the court dispenses with service of the order or judgment on the alleged contemnor.

6. But service is just one of the conditions that an applicant has to meet in contempt of court proceedings. The other condition is a warning to the alleged contemnor of the penal consequences that may ensue if the order is not complied with. In this regard, there has to 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. It has been held that without this display, the judgment or order may not be enforced unless it is an undertaking contained in a judgment or order.

7. The need to comply with these conditions, amongst other conditions, is a question that has been settled by the Court of Appeal in its previous decisions where this question has arisen.
8. 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 ...”*

9. The court further noted:

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

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

11. 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.”*

12. 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.”*

13. Rule 85.5 of the Civil Procedure (Amendment No. 3) Rules 2020 of England which would apply to contempt of court proceedings in this country by dint of section 5 of the Judicature Act, cap. 8 also require that the order or judgment be served and be endorsed with the requisite notice.

It 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. (Emphasis added).*

Of particular relevance is Rule 84.4 (2)(a) and (c).

14. The applicant has satisfied the two conditions of personal service and the endorsement of the order with the penal notice. There is no dispute that the decree was served. I note that the decree has also been endorsed with the penal notice warning the 3<sup>rd</sup> respondent of the consequences of non-compliance with the decree.

15. In the ultimate, I find the applicant's application to be merited. I hold the 3<sup>rd</sup> respondent to be in contempt of court and convict him accordingly. The application is allowed in those terms. Orders accordingly.

**Dated, signed and delivered on 31 October 2025**

Ngaah Jairus  
**JUDGE**