



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, G.B.M. KARIUKI & MWILU, JJ.A.)**

**CIVIL APPEAL NO. 212 OF 2014**

**BETWEEN**

**ISAIAH OCHANDA.....APPELLANT**

**AND**

**ATTORNEY GENERAL.....1ST RESPONDENT**

**PERMANENT SECRETARY**

**MINISTRY OF DEFENCE.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Ruling of the High Court of Kenya at Nairobi (W. K. Korir, J.) dated the 5<sup>th</sup> day of December, 2013*

*in*

**Judicial Review Application No. 148 of 2013)**

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**JUDGMENT OF THE COURT**

This is an appeal from the Ruling of the High Court (**Korir, J.**) dismissing with costs the appellant's application to cite the respondents for contempt.

The appellant who was a soldier in the Kenya Army engaged as a physical training instructor alleged that he fell down during a training session and sustained serious injuries, after which his employment was terminated on medical grounds. He filed a suit in High Court, **Civil Suit No. 1051 of 1996** against the Attorney General seeking monetary compensation. On 2<sup>nd</sup> March 2011, the High Court (**Rawal, J.** as she then was) entered judgment for the appellant as follows:

- (i) Balance of pension due and payable to the plaintiff.
- (ii) Balance of medical expenses as at 1996 on production of receipts.
- (iii) General damages in respect of pain and suffering and loss of amenities in the sum of Shs. 1,000,000/-

(iv) Special damages in the sum of Kshs. 6,500,000.- in respect of future medical expenses.

(v) Costs and interests as per the law.

On 14<sup>th</sup> November 2011, the Deputy Registrar of the High Court issued a certificate of order against the Government showing that the decretal sum due as at the date was Shs. 22,916,828/34.

The Government did not pay the decretal sum despite various demands. Some times in 2012 the appellant filed a Judicial Review application – **Case No. 229 of 2012** against the Attorney-General and the Permanent Secretary, Ministry of Defence seeking an order of mandamus compelling the respondents to satisfy the decree. On 21<sup>st</sup> November 2012, the High Court (**Korir, J.**) allowed the application and granted an order of mandamus. The Government, however, failed to satisfy the decree. This prompted the appellant to file **High Court Miscellaneous Application No. 148 of 2013** for an order that the respondents be cited for contempt of the order of mandamus and be committed to civil jail for a period not exceeding thirty days.

The respondents filed a notice of preliminary objection to the application based on three grounds namely, firstly, that the application is an abuse of the process of the court as it offends mandatory provision of section 8 of “**The Office of the Attorney General Act 2012**”; secondly, that the application is an abuse of the process of the court as the applicant has not complied with the legal requirements that there must be personal service on the alleged contemnor, and thirdly, that the application is misconceived and premature as the court order dated 21<sup>st</sup> November 2012 and issued on 22<sup>nd</sup> November 2012 is incompetent for failure to endorse a penal notice on the face of the order.

However, the preliminary objection was not raised before the application was prosecuted. Instead, the appellant’s counsel argued the application in full after which the State Counsel appearing for the respondents raised the grounds of objection in reply. Nevertheless, the High Court did not consider the grounds of objection first. It merely upheld the grounds of preliminary objection and dismissed the application without making specific finding on whether or not the respondents had deliberately disobeyed the order of mandamus.

The High Court relied on the authority of **Ochino & Another vs. Okombo & 4 others [1989] KLR 165** and paragraphs 61 and 62 of **Halbury’s Laws of England 4<sup>th</sup> Edition Vol. 9 at page 37** to the effect that, as a general rule no order of a court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been personally served on the person required to act or abstain from acting, and further that, the copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order he is liable to the process of execution to compel him to obey it.

The court came to the conclusion that the application could not succeed as the copy of the order was neither personally served nor endorsed with a penal notice. Having come to that conclusion, the court declined to determine whether the application had contravened the provisions of section 8 of The Office of the Attorney General Act, which *inter alia* exonerates the Attorney General from personal liability in respect of any proceedings in a court of law or in the course of discharging functions under the Constitution or for any matter done in good faith. While dismissing the application, the High Court appreciated that there was delay in satisfying the decree and that the decree ought to be satisfied.

The grounds in the memorandum of appeal fault the findings of the High Court that both the Attorney General and the Permanent Secretary should have been served with the order of mandamus personally and that the order of mandamus should have been endorsed with a penal notice.

There was an affidavit of service by **Bernard Musyoka**, a process server, that on 23<sup>rd</sup> November 2012 he served the order of mandamus and the Ruling of the High Court and accompanying letter on a clerk at the office of the Attorney General who acknowledged receipt by signing on the copy, and, that on 26<sup>th</sup> November 2012 he served the same documents upon the Legal Officer of the Department of Defence who

acknowledged service by stamping the main copy with the official stamp.

The accompanying letter dated 23<sup>rd</sup> November 2012 from the appellant's advocates to the two respondents stated in part:

***“The above captioned and the order annexed there refer.***

***Kindly oblige by making settlement as ordered herein.***

***TAKE NOTICE, that should we not hear from you within seven (7) days of service hereof upon yourselves, we have instructions to move the court for contempt proceedings. The result whereof is well known to you.”***

The copy of the said accompanying letter bore the official stamp of each of the respondents and signature of the person on whom the documents were served. Neither of the two respondents filed a replying affidavit to the application for committal for contempt either showing cause why the application should not be allowed or denying the service.

Service of the court processes on the Government is prescribed in **Order 5 rule 9 Civil Procedure Rules, 2010**, thus;

***“9 (1). The provisions of this Order shall have effect subject to section 13 of the Government Proceedings Act, which provides for the service of documents on the Government for the purpose of or in connection with civil proceedings by or against the Government.***

***(2) Service of documents in accordance with the said section 13 shall be effected –***

***(a) by leaving the document within the prescribed hours at the office of the Attorney General, or any agent whom he has nominated for the purpose but in either case, with a person belonging to the office where the document is left; or***

***(b) .....***

***(3) All documents to be served on the Government for the purposes of or in connection with any civil proceedings shall be treated for purposes of these rules as documents in respect of which personal service is not required.***

***(4) In this rule, “documents” includes writs, notices, pleadings, orders, summonses, warrants and other documents, proceedings and written communications.***

**Section 13** of the Government Proceedings Act aforesaid merely provides that all documents required to be served on the Government in civil proceedings shall be served on the Attorney General.

**Mr. Ngugi**, learned counsel for the appellant submitted in the High Court and still contends in this Court that, actual service was done in the office of the Attorney General – an institution and that personal service was not necessary.

The proceedings initiated by the appellant in the High Court were in the nature of civil proceedings for enforcement of a decree for payment of money against the Government. Both the Government Proceedings Act and the Civil Procedure Rules specifically provide that personal service is not required in such proceedings. Furthermore, the application before the court was for civil contempt as opposed to criminal contempt which would have necessitated a specific charge by the prosecuting authority, it is apparent that the court relied on general rules which do not specifically provide for service of court documents including court orders on the Government. As rule 3 of Orders aforesaid expressly provides **all documents** to be served on the Government, documents relating to civil proceedings are excluded from personal service. The specific provisions in our law prevail over the general rules on question of

service.

The appellant's counsel further submitted in the High Court that the letter dated 23<sup>rd</sup> November 2012 forwarding the Ruling and order constituted a penal notice. The letter is a notice to the government to pay within seven days and in default, contempt proceedings would be instituted.

That notice letter is for all intents and purposes an effectual penal notice as the object of the general rules has been substantially achieved.

The effect of the dismissal of the application is to require the appellant to take further steps and file fresh proceedings with resultant delay in realization of the fruits of the judgment. The appellant has severally demanded payments without success and filed several proceedings already since the judgment was entered in his favour. The principle purpose of the inherent jurisdiction bestowed on the courts is to vindicate the authority of the court so that its orders are obeyed for the proper administration of justice. The procedural protection in the nature of personal service and penal notice in the general rules are designed to give the alleged contemnor a fair hearing in view of the fact that contempt proceedings attract criminal sanctions. However, the procedural protection should not be construed in a manner that abrogates or renders the jurisdiction of the court to punish for disobedience of its order practically inoperative. In an appropriate case, the court retains the discretion to dispense with procedural protection in the interest of justice, more so now that **Article 159(2)(d)** of the Constitution ordains that justice shall be administered without undue regard to procedural technicalities. Had we found that personal service was required and was not done or that penal notice was not given, we would have in the circumstances of this case, dispensed with general rules.

It is our finding that the High Court fell into error by dismissing the application on the grounds that no personal service was effected nor penal notice given.

The appellant's counsel has asked us to allow the application which was dismissed by the High Court. However, the application was not determined on the merits as there was no finding that the respondents deliberately failed to satisfy the decree. Secondly, the application is imprecise as to which officer of the Government is responsible to satisfy the decree.

**Section 21(3)** of the Government Proceeding Act provides that the responsible officer is the accounting officer of the responsible Ministry of the Government. Nevertheless, **section 21(4)** provides, in essence, that, no officer of the Government shall be individually liable for payment of money or costs ordered against the Government or any Government department or any officer of the Government.

The appellant needs to amend the application to identify the responsible officers before any executable order can be granted.

For the foregoing reasons;

1. The appeal is allowed with costs and the application is restored to hearing.
2. The appellant to file an amended application within 30 days of this judgment
3. The amended application be heard before a judge other than **Korir, J.** on the merits.
4. The respondents in the amended application are at liberty to file any appropriate response to the application within 14 days of service.

Orders accordingly.

***Delivered at Nairobi this 9<sup>th</sup> day of December, 2016.***

***E. M. GITHINJI***

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**JUDGE OF APPEAL**

**G.B.M. KARIUKI**

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**JUDGE OF APPEAL**

**P.M. MWILU**

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**JUDGE OF APPEAL**

*I certify that this is a  
true copy of the original*

**DEPUTY REGISTRAR**