



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**MISC.CIVIL APPLICATION NO.17 OF 2012**

**REPUBLIC .....APPLICANT**

**VERSUS**

**PERMANENT SECRETARY MINISTRY OF STATE FOR  
PROVINCIAL ADMINISTRATION AND**

**INTERNAL SECURITY .....1<sup>ST</sup> RESPONDENT**

**THE SOLICITOR GENERAL .....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

1. The Applicant has moved Court through the Notice of Motion dated 21<sup>st</sup> May 2012 for the following orders:
  - a. **“The Honourable Court be pleased to Order for the detention in prison of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for a term not exceeding six (6) months for disobeying an Order of Court issued against them in BUSIA CMCC NO.300 OF 2003 requiring them to pay out to the Applicant the decretal sum, costs plus interest in the said suit within 90 DAYS from 10<sup>th</sup> January 2012.**
  - b. **Cost be provided for.”**
2. The Applicant was the Plaintiff in Busia CMCC No.300 of 2003 where he had sued the Attorney General for Damages for Malicious Prosecution and Defamation. Judgment was entered in his favour on 4<sup>th</sup> May 2005 and subsequently his costs were assessed. The Decree was for ksh.340,000/= and costs of ksh.46,805/=. The Decretal sum was to attract interest.
3. This Court is told that a copy of the Decree and certificate of costs was forwarded by Counsel for the Applicant to the Provincial Litigation Counsel vide a letter of 21<sup>st</sup> December 2005. In a subsequent letter of 9<sup>th</sup> September 2008 the Senior Principal Litigation Counsel wrote to the Senior Deputy Solicitor General forwarding the case file to enable the Solicitor General pursue payment.
4. But no payment was forthcoming and so on 10<sup>th</sup> January 2012, the Applicant obtained an order from the Trial Court directing the Respondents to settle the claim within 90 days. That order, it is said, was served on both Respondents on 20<sup>th</sup> January 2012. To date no payment has been made and the Applicant contends that the non-payment constitutes contempt of Court by the Respondents.
5. Prior to the bringing of the Application, the Applicant sought and obtained permission to

commence these proceedings. That permission was obtained in Busia High Court Misc Application No.91 of 2012. The manner in which that leave was obtained has now been challenged and the Court shall be considering that challenge as a preliminary issue.

6. The Respondents opposed the Application through the Principal Litigation Counsel who filed some grounds of opposition dated 24<sup>th</sup> July 2012. He raises the following grounds;

1. **There was no personal service upon the respondents.**
2. **The respondents cannot be held personally liable for liabilities of the government as per section 21(4) of the Government Proceedings Act.**
3. **The committal to civil jail of the 1<sup>st</sup> and 2<sup>nd</sup> respondent would be a violation of their rights.**

7. In his written submissions The State Counsel argued an additional ground. He argued that the Application is fatally bad because The State Law Office was not served at the leave stage as required by procedure.

8. It is acknowledged by the parties that, because of the Provisions of Section 5 of **The Judicature Act, Cap (8)** Kenyan Courts must adopt the practice and procedure as from time to time possessed by the High Court of Justice in England in contempt of Court matters. Section 5 of the Judicature Act (**Chapter 8 Laws of Kenya**) provides:-

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

9. At the time the Applicant desired to commence contempt proceedings in 2012, the contemporary rules of The Supreme Court of England required the Applicant to obtain permission to take out the committal Application and Rule 52.2 (3) thereof required that the Applicant gives notice of the Application for permission not later than the preceding day to the Crown Office. In addition the Applicant must at the same time lodge with that office, copies of the statement and affidavit. The Kenyan equivalent of the Crown Office is the State Law Office.

10. In the course of hearing the State Counsel argued that the committal Application was defective because the State Law Office was not served at the leave stage. It is my view that this issue was raised too late in the day and is not available for my consideration and determination. Whether or not the State Law Office was served is a matter of fact. When confronted with the committal Application, the State Law Office chose to respond to it by way of grounds of opposition. In none of the filed grounds did it question the manner in which the Applicant obtained permission. To take up the matter for the first time during the hearing of the Application is to ambush the Applicant who is thereby deprived of a fair chance of rebutting the allegation. I decline to entertain that argument.

11. I now turn to the substance of Application. It does not seem disputed that the following orders were made in Busia CMCC No.300 of 2003.

**“1. ....**

**2. The Government of Kenya through the Permanent Secretary, Ministry of State for Provincial Administration and Internal Security and the Solicitor General are hereby directed to pay out to the plaintiff the decretal sum, costs plus interest herein within 90 DAYS from the date hereof and in default the said officials be cited for contempt of Court.”**

It is also not in dispute that at the bottom of the order was this penal Notice,

**“This is a lawful Court order which requires strict compliance and disobedience thereof shall constitute contempt of Court.”**

12. A matter in issue is whether the Respondents were duly served with this order. The order is said

to have been served on 20<sup>th</sup> January 2012 by one Vincent Otieno Ogutu. Paragraph 3 and 4 of his filed affidavit of service are relevant. This is what he states,

**“THAT on 20<sup>th</sup> January, 2012 I travelled to Nairobi and then proceeded to the Office of the President at Harambee House, Harambee Avenue of P.O. Box 40112-00200 NAIROBI to effect service upon Permanent Secretary Ministry of State for provincial Administration and Internal Security where I met with the clerk in the said Ministry offices and after my introduction and purpose of my visit he acknowledged service by stamping and signing on the face of the order.**

**That on the same day I proceeded to the State law Office of P.O. Box 40112-00200 NAIROBI to the effect service upon the Solicitor General where I met with the clerk in the said offices and after my introduction and purpose of my visit he acknowledge service by stamping and signing on the face of the order.**

13.It is submitted by Applicant that this was sufficient service. That the clerks were agents of the Respondents and had duly received process on their behalf. Counsel for the Applicant then submitted.

**“Further there is no evidence tendered to prove that the clerk forwarded the Orders to persons different from the contemnors/respondents, or that the contemnors didn’t receive the Order. The outright presumption is the contemnors were duly served.”**

But The State Counsels view was that service on the clerks did not amount to personal service and the application could not succeed.

14.The penal consequence sought by the Applicant for the alleged contempt is imprisonment for a term not exceeding six (6) months. If I were to grant it, then the Respondents would be deprived of their personal liberties for a period of whatever term I will have imposed. No doubt dire orders. For that reason I must exercise the power cautiously and only if this is the clearest of cases.

15.It is conceded by the Applicant that the order was served on the clerks of the Respondents and not the Respondents themselves. No reason is proffered as to why the Respondents were not personally served. It is not alleged that they obstructed or evaded service. It is not alleged or proved that they directed that their clerks should receive process on their behalf. It is neither alleged or proved that there was a legal basis to serve their clerks and not themselves in person. For this reason there is no knowing, with certainty, that the Respondents were aware of the existence of the Court order. I was argued to presume that the alleged contemnors received the order from their clerks because there was no specific denial by the Respondents. The onus to prove that the Respondents were personally served is on the Applicant and not the Respondents. All the Applicant proved is that the Respondents clerks were served. I cannot take away the liberty of the Respondents on the basis of a presumption.

16.I hasten to add that it would have been unnecessary for the Applicant to strictly prove personal service if he had proved that the Respondents had knowledge of the Court order from whatever source. That more emphasis is now given to knowledge than personal service was pointed out by **Lenaola J** in Nrb Petition No.64 of 2010 **Kenya Tea Growers Association –vs- Francis Atwoli & 5 others** where he said,

**“17. On this issue, our Courts seem to have moved steadily towards the position that although Order 52 Rules 3 and 4 of The Supreme Court Practice Rules of England would point towards personal service as a factor in determining contempt, in fact knowledge of an Order is higher than service.”**

That said, the Applicant herein cannot benefit from this shift in stance because right from the outset, at the leave stage, the Applicant relied on service and not knowledge as the basis of his Application. The Applicant was therefore under an obligation to sufficiently prove personal service.

17. So for reasons given, the Application dated 21<sup>st</sup> May 2012 lacks merit and I do hereby dismiss it with costs.

**F. TUIYOTT**

**J U D G E**

**DATED, SIGNED AND DELIVERED ON THIS 28<sup>TH</sup> DAY OF JANUARY, 2014.**

**IN THE PRESENCE OF:**

**KADENYI .....COURT CLERK**

**.....FOR APPLICANT**

**.....FOR 1<sup>ST</sup> RESPONDENT**

**.....FOR 2<sup>ND</sup> RESPONDENT**