



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

ORIGINATING SUMMONS NO.3 OF 2018

MERCY MWIKALI KANGOL1..... APPLICANT

-VERSUS-

JOSHUA MATHEKA NGUMBI.....RESPONDENT

RULING

1. This ruling relates to two applications that shall be addressed chronologically.

(a) Application to Review, set aside or discharge the orders issued on 9.10.2018:

2. The Respondent filed the application under Order 45 Rule 1 and 2, Order 51 Rule 1 of the Civil Procedure Rules and Section 80, 1A, 1B, 3 and 3A that sought for review, setting aside or discharge of the orders dated 9.10.2018.

3. The application was grounded on the following facts as per the affidavit of Joshua Matheka Ngumbi dated 10.4.2019; that a ruling was delivered on 9.10.2018 in which the applicant is willing but unable to comply with the same. Copies of the ruling was attached to the application. The deponent averred that he used the rental proceeds to pay for a loan and that he used his sister's property to secure the loan that he used to put up flats on the property, a copy of a bank statement from 1.8.2017 to 8.1.2019 was annexed. He averred that the repayment of the loan has made him financially constrained hence he is unable to make prompt payments. He also added that he used the rental proceeds to cater for the needs of the children and annexed an account showing the rental proceedings and that the respondent has gone ahead to file a suit in Nairobi against the applicant in the Nairobi Children court and has obtained a court order directing him to pay Kshs 30,000/- per month. A copy of the said order was annexed.

4. In reply to the application, the Respondent vide affidavit deponed on 28.5.2019 opposed the application. She deponed that the application was brought seven months after the order was made and that the delay is not explained. She averred that no new issues have been brought to warrant review. She assailed the use of a bank statement in respect of a company that she is a director too and also the failure of the applicant to annex a charge over the matrimonial property or over the suit property. She denied that the applicant was making payment towards the maintenance of the issues of their union and urged the court to dismiss the application.

5. The court directed the parties to file and exchange submissions.

6. Counsel for the applicant cited section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules and submitted that the applicant had met all the conditions to warrant a review.

7. Counsel for the Respondent vide written submissions filed on 17.6.2019 placed reliance on the case of **The Executive Committee Chelimo Plot Owners Welfare Group & 288 others v Langat Joel & 4 others (sued as the Management Committee of Chelimo Squatters Group) [2018] eKLR** and submitted that failure to annex the order of the court that the applicant sought to review rendered the application defective. Counsel submitted that the applicant had not satisfied the requisite grounds for review as envisaged under Order 45 of the Civil Procedure Rules.

8. In this application, it appears that the contest is whether or not the applicant is able to comply with the orders issued on 9.10.2018. After going through the evidence on record, I find the issue to be determined is whether or not the applicant has raised sufficient grounds to warrant setting aside, review or discharge of orders issued on 9.10.2018.

9. The law that governs review is stated in Order 45 Rule 1 and 2 of the Civil Procedure Rules. The general principle is that only the court that has passed a judgment can review it.

10. Any person aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred.... may apply to the court which passed the decree or order for a review of the judgment (See section 80 of the Civil Procedure Act and O.45 r. 1 and 2 of the

Civil Procedure Rules).

11. Section 80 of the civil Procedure Act which governs applications for review of court orders/judgment provides as follows;

“80. Review.

Any person considering himself or herself aggrieved—

(a) *by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*

(b) *by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order on the decree or order as it thinks fit.”*

The provisions above are replicated in Order 45 of the Civil Procedure Rules which amplifies on the law by providing for the considerations when granting an application for review. It provides as follows;

“1. Application for review of judgment.

(1) Any person considering himself or herself aggrieved—

(a) *by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

(b) *by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him or her, may apply for a review of judgment to the court which passed the decree or made the order.”*

12. Review concerns itself with; discovery of new and important matters; error on the face of the record and sufficient cause. The applicant complains about his finances that are the subject of the ruling that was delivered by this court. The applicant in his application has told the court that he had been condemned to deposit rent received from houses built on the matrimonial home and that the rent ranges between 48,000/- to 112,000/-. He has averred that the children court had condemned him to pay Kshs 30,000/- per month for upkeep of the children hence he is unable to comply with the court order that is evidently of an interim nature. It was his case that there is an outstanding loan that he ought to pay. In response, the respondent has averred that the applicant has not demonstrated that he had an outstanding loan and that he had not demonstrated that he paid fees for the issues of the marriage. I note that the order sought to be reviewed gave no specific amount whereas the applicant in his evidence seems to offer an average of Kshs 80,000/- per month and this would be subject to the Kshs 30,000/- that the Nairobi Children court had condemned the applicant to pay. The application is found partially meritorious and is proved that the applicant has financial obligations that necessitate interference with the earlier order of court. I am not convinced with regard to the loan obligations but however I am satisfied that there is a court order from the Nairobi Children court hanging over the head of the applicant and in that regard a discharge of the order ought to ensue. Consequently prayer (a) in the ruling dated 9.10.2018 is reviewed to the extent that the Respondent deposits the rental income less the amount paid for the children’s upkeep as per the Nairobi Children Court. However the other orders in the ruling will remain as had been passed by the court. The application is allowed in that regard.

(b) Application for contempt of court filed on 21.5. 2019:

13. The Applicant **Mercy Mwikali Kangoli** filed a notice of motion dated 20th April, 2019 under Section 4, 5, 7 and 28 of the Contempt of Court Act and Order 51 Rules 1, 2 and 3 of the Civil Procedure Rules and sought an order that the Respondent be committed to civil jail for contempt for disobedience of the orders issued on 9.10.2018.

14. The application is grounded on the following facts;

a. The Court on 9.10.2018 granted inter alia an order that the respondent deposit the all proceeds of the flats constructed on the Plot 5 in Athi River in court and that the respondent furnish accounts in respect of the same.

b. The respondent was served with the said ruling and has ignored the same.

15. The applicant herein through her affidavit sworn on **20.4.2019**, deponed that despite the court directing that rent in respect of the suit property be deposited in court and that an account be furnished, no compliance was made. Copies of the order, letters forwarding the same were annexed to the application.

16. In reply to the application, Joshua Matheka Ngumbi vide replying affidavit dated 4.6.2019 averred that he was not personally served with the order and that he was unable to comply with the same and further that he has made an application in respect of the same.

17. The court gave directions that the matter be canvassed by way of submissions.

18. Counsel for the applicant submitted that the respondent was in total disregard of the orders issued on 9.10.2018 and thus the Respondent should be punished for contempt.

19. Counsel for the Respondent submitted that the Contempt of Court Act was declared unconstitutional in the case of **Kenya Human Rights Commission v Attorney General & another [2018] eKLR** hence the application should be dismissed.

20. In the case of **Sam Nyamweya & Others –v- Kenya Premier League Ltd and Others [2015] eKLR**) the court stated that:-

“contempt of court is constituted by conduct that denotes wilful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”

21. From the above definition of contempt of court the issues for determination are;

- a) *What is the law applicable in respect of contempt of court?*
- b) *Were the orders issued on 9.10.2018 valid orders of the Court?*
- c) *Were these orders served upon contemnor and was he aware of the said orders?*
- d) *Is the respondent guilty of contempt of the above stated orders?*
- e) *What orders may court grant?*

22. From the court record, the application is brought under Section 4, 5, 7 and 28 of the Contempt of Court Act.

23. The case of **Kenya Human Rights Commission v Attorney General & another [2018] eKLR**, Justice E.C. Mwita held that :

“1. A declaration is hereby issued that Sections 30, and 35 of the impugned contempt of court Act No 46 of 2010 are inconsistent with the constitution and are therefore null void.

2. A declaration is hereby issued that the entire contempt of court Act No 46 of 2016 is invalid for lack of public participation as required by Articles 10 and 118(b) of the constitution and encroaches on the independence of the Judiciary.”

24. In respect of the declaration of unconstitutionality of the Contempt of Court Act, the South African case of ***Sias Moise v Transitional Local Council of Greater Germiston, Case CCT 54/00, Justice Kriegler (for the majority) held:***

“If a statute enacted after the inception of the Constitution is found to be inconsistent, the inconsistency will date back to the date on which the statute came into operation in the face of the inconsistent constitutional norms. As a matter of law, therefore, an order declaring a provision in a statute such as that in question here invalid by reason of its inconsistency with the Constitution, automatically operates retrospectively to the date of inception of the Constitution.”

25. Therefore as it is there is no law that governs contempt of court and the application was brought under incorrect provisions of the law. Recourse would have to be had to the provisions of Section 3 of the Judicature Act that provides that;

“The jurisdiction of the Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and of all subordinate courts shall be exercised in conformity with—

- a) *The Constitution;*
- b) *subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;*
- c) *subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date.*

Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.”

26. In this regard the statutes of general application ***in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date*** in respect of contempt of court indicate that *the only other law relating to contempt of court in England was contained in sections the Supreme Court of Judicature Act 1873 and 1875 and the procedure is provided for under Order 52 Rules 1 to 4 of the Rules of the Supreme Court.*

27. The procedure in that regard is Order 52 RSC, that may be summarized as follows, in so far as it relates to the High Court of Justice:-

- i) ***An application to the High Court of England for committal for contempt of court will not be granted unless leave to make such an application has been granted.***

ii) *An application for leave must be made ex parte to a judge in chambers and supported by a statement setting out the particulars of the applicant as well as those of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit verifying the facts relied on.*

iii) *The applicant must give notice of the application for leave not later than the preceding day to the Crown Office.*

iv) *Where an application for leave is refused by a Judge in chambers the applicant may apply afresh to a divisional court for leave within 8 days after the refusal by the Judge.*

v) *When leave has been granted, the substantive application by a motion would be made to a divisional court.*

vi) *The motion must be entered within 14 days after the granting of leave; if not, leave shall lapse.*

vii) *The motion together with the statement and affidavit must be served personally on the person sought to be committed, unless the Court thinks otherwise.*

28. In the case of **North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi [2016] eKLR Justice Mativo** observed that leave is not required where committal proceedings relate to a breach of a judgement, order, or undertaking. Despite having brought the application under the incorrect provisions of the law, the root of the application is a disobedience of a court order therefore the court ought to satisfy itself of the elements of civil contempt as were laid out in *Contempt in Modern New Zealand* that was cited in **North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi [2016] eKLR** as follows:-

"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

(a) *the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;*

(b) *the defendant had knowledge of or proper notice of the terms of the order;*

(c) *the defendant has acted in breach of the terms of the order; and*

(d) *the defendant's conduct was deliberate.*

29. With regard to the 2nd issue it is not disputed that the impugned order is a valid Court order as witnessed by the court record.

30. With regard to the 3rd issue, whether the said Court order was served to the contemnor, the record bears witness that there was no affidavit of service on record. However the respondent was always party to these proceedings. He was privy to and had knowledge of these proceedings right from the start to date. In fact the application for variation of the court order is hinged on the subject order hence the 3rd issue is answered in the affirmative.

31. The 4th issue is disobedience of the court orders *a priori* is the respondent guilty of contempt of the above stated orders?

32. In **Re Bramblevale (1970) 1 Ch. 128** Lord Denning stated as follows:

“Contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond all reasonable doubt.”

33. The burden of proof of Contempt of Court is beyond reasonable doubt that the respondent willfully disobeyed Court order cited above.

34. What constitutes Contempt of Court in the instant case is as follows;

- The respondent has not deposited the rent in court.
- The respondent has not provided accounts.

35. I find that, although the conduct complained of amounts to contempt of the Court's orders cited above, I find that the applicant has not discharged her legal duty to prove beyond reasonable doubt the contempt by the respondent and further the order has been challenged vide application dated 10.4.2019 in which the parties agreed to canvass together with the contempt application. To that extend the contempt application dated 20th April 2019 lacks merit and is dismissed.

36. Both applications having been determined the following orders are hereby made:

i. The Respondent is hereby directed to comply with the orders issued on 9.10.2018 and as reviewed above within the next thirty (30) days.

ii. The Applicant be at liberty to institute contempt proceedings against the Respondent in the event of default to comply with the court orders of 9.10.2018.

iii. Each party to bear their own costs.

It is so ordered.

Dated and delivered at Machakos this 18th day of December, 2019.

D. K. Kemei

Judge