



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2892 OF 1993

JAMES H. GITAU MWARA.....PLAINTIFF/RESPONDENT

VERSUS

THE ATTORNEY GENERAL.....DEFENANT/RESPONDENT

MTHONI KIMANI.....INTERESTED PARTY

RULING

On 7th of May, 2015 the interested party/ applicant was convicted of contempt of court and on 15th June, 2015 fined Kshs. 300,000/= in default to serve 3 months imprisonment. There is now before me an application by way of Notice of Motion under Order 45 Rule 1 and 2 of the Civil Procedure Rules for orders to review and or vary the ruling of 7th May, 2015 and the consequential orders made on 15th June, 2015 by Onyancha J, in which he found the applicant to be in contempt of court on matters she was not personally responsible for, thereby setting a bad precedent or principle and indeed legal practice.

In the alternative the court has been asked to set aside the said orders of 7th May, and 15th June, 2015 for being unlawful, lacking in merit and consequently unfair.

The grounds upon which the application is based are that the said orders were without any basis in law, and that there are new and important facts touching on the matter in that, although the applicant was convicted of contempt of court arising from undefended and uncontested proceedings, it was not though her disregard of the court process nor orders, but a failure on the part of the Attorney General's office (Litigation Department) to notify her of the proceedings relating to the contempt or appearance in court to contest the same. She was convicted of contempt and ordered to pay a fine for failure to pay the respondent despite the fact that she was not the Accounting Officer in the State Law Office.

It is therefore in the interest of justice that the ruling and order of conviction be reviewed to put the law in perspective in so far as the issue of contempt of employee in a public State Law Office.

There is a supporting affidavit sworn by the applicant. Although the application was served upon the respondent no reply was filed and on the date of the hearing the respondent did not appear. Order 45 rule 1 provides that any person who considers himself or herself aggrieved by a decree or order and where no appeal has been preferred, **“ and who from the discovery of a new and important matter or evidence, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or 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 or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”**

Onyancha J is now retired and so this court is seized of the application. I must emphasise that this is not an appeal because in any case I cannot sit on appeal from a decision of court of concurrent jurisdiction.

The applicant has sufficiently explained the process that led to her being convicted and fined in these proceedings. She was never personally served by the respondent as the application for contempt and or subsequent proceedings were served upon the Attorney General's office.

The Solicitor General is the Accounting Officer in the State Law Office responsible for all payments due by the State Law Office. The applicant was not the holder of that office. Before the court sentenced the applicant she had ensured that the decretal sum due and payable to the respondent had been affected. In effect, she had purged the alleged contempt. That notwithstanding, the respondent with a view to harassing and intimidate the applicant has continued to press for her removal from office, which she considers to be a personal vendetta founded on malice. She fears therefore that this may ruin her exemplary career in civil service.

I have taken time to go through the record before me. It is true that the applicant herein is not and has never been the Accounting Officer in

the State Law Office. She could not therefore be faulted for not settling the decretal sum, if anything her duty was to advise settlement of any sums due and payable, not only to the respondent, but any other matter where the State Law Office was required to settle. Beyond that she had no authority.

It is not clear why this very important explanation did not find favour in the mind of the learned judge in reaching the conviction and subsequent sentencing of the applicant. Contempt proceedings are of a personal nature and therefore personal service is contemplated. The consequences of contempt proceedings against a party may lead to deprivation of freedom, attachment of property and civil jail. Since such proceedings take an angle of criminal nature, proof of any allegation should always be beyond any reasonable doubt. With profound respect, that threshold was not achieved.

Further to the foregoing, the decision rendered by the court exposes the applicant and possibly many other public servants whose duty is to facilitate, to untold dangers which fall under the responsibilities of their seniors.

After considering all the material placed before me, and since there is no reply filed, the averments by the applicant remain uncontroverted. She has established to the satisfaction of this court she was not responsible for the settlement of the respondent's claim. Her duties were limited. She had no knowledge of the contempt proceedings and has demonstrated good faith in the circumstances of this case.

Any adverse observations in the ruling and the order of Onyancha J, and the petition on record filed by the respondent shall have no effect on the applicant. I am satisfied that the conviction and sentence thereof should be reviewed such that the same is vacated, and the sum of Ksh. 300,000/= paid by the applicant as time should be refunded to her forthwith. There is no order as to costs.

Dated, signed and delivered at Nairobi this 17th day of May, 2018.

A. MBOGHOLI MSAGHA

JUDGE