



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

MISCELLANEOUS CAUSE NO.76 OF 2015

ALOISE CHWEYA OBAGA.....APPLICANT

VERSUS

OURU POWER LIMITED.....1ST RESPONDENT/CONTEMNOR

MOGAKA MOGAMBI.....2ND RESPONDENT/CONTEMNOR

JOSEPHAT O. NYACHOTI.....3RD RESPONDENT/CONTEMNOR

(T/a Min Max Auctioneers)

RULING

1. This ruling relates to the application dated 12th October, 2015 brought under Section 5 of the Judicature Act and Section 1A, B & 3A of the Civil Procedure Act in which the applicant seeks the following orders:

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1. Spent.

2. That the Honourable Court be pleased to grant leave to the applicant to take out Contempt proceedings against the said Contemnors herein for disobeying Court Orders given by the Business Premises Rent Tribunal in Cause No.53 of 2015-Kisii made on the 24th & 29th September 2015 & 6th October 2015 and thereby being in contempt of the court.

3. Costs of this application be provided for.

4. Such further Orders as the court may deem fit and expedient to grant.

2. The application is supported by the applicant's affidavit filed on 13th October 2015 wherein he deposes that the 1st, 2nd and 3rd respondents are the landlord, landlord's managing director and authorised auctioneer respectively and that on the 23rd September, 2015 he filed a reference vide Business Premises Rent Tribunal Case No. 53 of 2015 in Kisii after which orders were issued on 24th September 2015 restraining the 1st respondent from increasing rent pending the determination of the reference which order was served on the 1st respondent on the 25th September 2013. He attached a copy of the said order as exhibit "CO2."

3. The applicant contends that despite the said reference and in total disobedience of the order of the

Tribunal, the landlord still moved to levy distress for rent by instructing the 3rd respondent to proceed to attach and carry away his goods of trade without notice or proclamation and despite the fact that he (3rd respondent) was aware of the reference and order of the tribunal.

4. He further states that he again moved to the tribunal on 29th September 2015 and obtained further orders, inter alia, restraining the 1st respondent from disposing off the attached property, and further directing the 1st respondent to receive rent failure of which the same would be deposited at the tribunal. He attached a copy of the said order which was marked as "ACO3." He adds that the said order and cheques for the rents due together with the auctioneer's charged was duly served on the respondents as shown in annexure "ACO4 a & b" but that despite service and payment of all the rents due, the respondents still moved to break into the leased premises wherein they broke down the partitions and carried away the applicants property thereby prompting the applicant to report the matter to the police under OB No. 30/1/10/2015 and the same is still under investigation. He thus contends that he was forcefully evicted from the leased premises despite the aforementioned orders of the tribunal.

5. The applicant's case is that despite further orders of the tribunal specifically directing the respondents to release his attached property to him, which orders were duly served upon the respondents, the 2nd and 3rd respondents instead carted away the attached goods to an unknown destination and that they have to date refused to comply with the tribunal's orders.

6. It is the applicants case that as a result of the refusal and failure by the respondents to comply with the orders of the tribunal, issued on the 24th and 25th September 2015 and 6th October 2015, he has been deprived goods of trade, has undergone massive financial loss and that if this disobedience is not punished, it may set a bad precedent.

7. The respondents opposed the application through the 3rd respondent's replying affidavit dated 9th November 2015 in which he avers he received instructions from the 1st respondent to levy distress against the applicant's movable property with a view to recovering rent arrears in the sum of Kshs. 984,809.67 as shown in copies of letters dated 11th September 2015 marked as "**JN 1(a) & (b)**". He deposes that he then proceeded and proclaimed the applicant's movable properties and thereafter served the applicant with the requisite proclamation notice(s) which he attached and marked as "**JN 2(a) & (b)**". He contends that upon service with the proclamation, the applicant was obliged to settle rent arrears but nevertheless he (applicant) failed to do so thereby prompting him to proceed and levy distress on the applicant's movable property that had been proclaimed. He attached a copy of the Notification of Sale marked as "**JN 3.**"

8. The 3rd respondent further avers that before he could sell /dispose the attached movable properties, the 2nd respondent informed him that he had been served with an order issued on 29th day of September 2015 stopping the sale and disposal of distrained goods which goods he kept pending further orders of the court or instructions from the 1st respondent.

9. The 3rd respondents case is that the 1st respondent lodged an appeal and obtained orders of stay of execution of the orders of the tribunal made on 6th October 2015. He attached a copy of the order of Stay of Execution which was marked as "**JN 5**". He states that owing to the fact that the orders of the Honourable Tribunal made on 6th October 2015 had been stayed by the Honourable Court, the said orders are no longer capable of being executed or being enforced.

10. Both parties opted not to submit on the application and stated that they will rely on their pleadings.

Analysis and determination

11. After considering the application and the replying affidavit, I am of the view that the only issue that arises before this court for determination is whether the application for leave to institute contempt of court proceedings against the respondents is merited or necessary bearing in mind the circumstance of this case.

This calls for an examination of the procedure for instituting contempt of court proceedings.

12. It was not disputed that the relationship between the applicant and the 1st respondent is that of tenant and landlord respectively. It was also not disputed that on 23rd September 2015 the applicant filed a reference vide Business Premises Rent Tribunal Case No. 53 of 2015 and that on 24th September 2015, the applicant obtained orders restraining the 1st respondent from increasing rent pending the determination of the reference which order was served upon the 1st respondent on 25th September 2015. It was however alleged that the said orders notwithstanding, the 1st respondent instructed the 3rd respondent to attach and carry away the applicant's goods of trade without notice thereby prompting the applicant to seek further orders from the tribunal restraining the 1st respondent from interfering with the applicant's quiet and lawful enjoyment of the suit premises and further that the applicant pays Kshs. 20,000 being auctioneers charges on without prejudice basis before the attached goods are released.

13. The said order was served to the 1st and 2nd respondents together with cheques for the payment of rent arrears and auctioneers costs as ordered by the tribunal. The applicant's case was that despite service with the tribunal's orders and despite payment of the rent arrears and the auctioneer's charges, the 3rd respondents moved into the rented premises, broke down the partitions and carried away the applicant's movable properties.

14. The 3rd respondent acknowledged, at paragraph 12 of his replying affidavit that he was made aware of the orders of the tribunal dated 6th October 2015 but contended that the 1st respondent lodged an appeal together with an application for stay of execution of the orders of the Honourable Tribunal issued on 6th October 2015. This court however notes that the purported stay of execution that the 3rd respondent alleges that the 1st respondent was issued with has not been attached to his replying affidavit. The 3rd respondent's case was that he was not personally served with the Tribunal's order dated 6th October 2015.

15. In the case of **Katsuri Limited v Kapurchand Depar Shah [2016] eKLR Mativo J** observed: -

" I find it fit first to examine the procedure for instituting contempt of court proceedings in this country. This calls for examination of Section 5 of the Judicature Act which provides as follows: -

(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.

16. The procedure for instituting Contempt proceedings in Kenya was extensively discussed by **Odunga J** in the case of **John Mugo Gachuki vs New Nyamakima Co. Ltd Civil Case No. 456 of 2011** wherein he observed as follows: -

"It is unfortunate that nearly 50 years after independence our procedure, with respect to punishment for contempt in our Court is referable to the procedure in High Court of Justice in England. It is saddening that the entities entrusted with updating and drafting our laws have not seen the urgency of enacting our own law relating to such an important aspect of the Rule of Law. That being the position, ours is not to enact the law but to interpret the law as enacted."

17. Therefore, the law that governs contempt of court proceedings is the English law applicable in England at the time the alleged contempt is committed. Section 5 of the Judicature Act imposes a duty on the High Court, the Court of Appeal and law practitioners to ascertain the applicable law of contempt in the High Court of Justice in England, at the time the application is brought. This duty was noted by **Platt J** and **Porter J** (as they then were) **in the matter of an application by Gurbaresh Singh & Sons Ltd Misc. Civil Case No. 50 of 1983** where they stated: -

"The second aspect concerns the words of Section 5- "for the time being", which appear to mean that this court should endeavour to ascertain the law in England at the time of the trial, or

application being made. Sometimes it is not known, or may not be known exactly, what powers the court may have. It seems clear that the Contempt of Court Act 1981 of England is the prevailing law and that the procedure is still that set out in order 52 of the Supreme Court Rules." (Emphasis supplied)

18. Discussing the procedure in England, the Court of Appeal in *Christine Wangari Chege vs Elizabeth Wanjiru Evans & Others* [2014] eKLR observed as follows: -

"Though the Court of Appeal of England and Wales was established in 1875, some 92 years before the commencement of the Judicature Act, [8] the Act in the cited Section 5 simply directs that this court like the High Court must make reference to the powers exercised by the High Court of Justice in England and not those exercised by its counterpart, the Court of Appeal of England and Wales.

The High Court of Justice in England is that level of the court system in England, comprising three divisions, the Queen's Bench, the Chancery and Family Divisions. That court draws its jurisdiction to punish for contempt of court from both the statute, namely the Contempt of Court Act, 1981 and the Common Law. But the procedure to be followed in commencing, prosecuting and punishing contempt of court cases was, until 2012, as will shortly be explained, provided for by Order 52 Rules 1 to 4 of the Rules of the Supreme Court (RSC), made under the Supreme Court of Judicature Act, 1873 (or simply the Judicature Act, 1873). The Judicature Act, 1873 abolished a cluster of courts in England and Wales dating back to medieval periods, some with overlapping judicial powers, and in their place Supreme Court of Judicature, which must not be confused with the Supreme Court of the United Kingdom which was established only on 1st October, 2009 assuming the judicial features of the House of Lords.

Order 52 RSC, until 2012 as alluded to earlier provide the procedure of commencing contempt of court proceedings. The procedure 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.

19. The learned Judges in the above case correctly pointed out that the rules applicable in the United Kingdom have been applied in Kenya with uneven degree of consistency and cited several examples. The only consistency in the decided cases is that leave was a requirement.

20. However, following the implementation of the famous Lord Woolf's "Access to Justice Report, 1996", The Rules of the Supreme Court of England (RSC) are gradually being replaced with the Civil Procedure Rules, 1999. On 1st October, 2012, the Civil Procedure (Amendment No.2) Rules, 2012 came into force and Part **81** thereof effectively replaced Order 52 RSC in its entirety. Part **81** (Applications and Proceedings in Relation to Contempt of Court) provides different procedure for four different forms of violations.

Rules 81.4 relates to committal for "breach of a judgement, order or undertaking to do or abstain from doing an act."

Rule 81.11- Committal for "interference with the due administration of justice" (applicable only in criminal proceedings

Rule 81.16- Committal for contempt "in the face of the court"), and

Rule 81.17- Committal for "making false statement of truth or disclosure statement."

21. An application under Rule **81.4** (breach of judgement, order or undertaking) now referred to as "*application notice*" (as opposed to a notice of motion) is the relevant one for making the application now under consideration. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon.

22. In the above cited case of *Christine Wangari Gacheche (supra)* the Court of Appeal correctly pointed out that leave, now called "*permission*" is not required where committal proceedings relate to a breach of a judgement, order, or undertaking. However, leave is still a requirement for applications under Rules **81.12 & 81.17** cited above.

After evaluating the above Rules, the Court of Appeal in the above cited case concluded that "*we find that on the basis of the new Civil Procedure Rules (of England) contained in the Second Supplement to the 2012 White Book, no leave is required before bringing an application, like the one before us, for committal for contempt relating to breach of this court's order...*" On that basis, I find that it was not necessary for the applicant to seek leave before filing this application, hence this application is properly before the court."

23. In the instant case and applying the above discussion, the applicant seeks leave of this court to institute contempt proceedings against the respondents for breach of an order by the tribunal which for all intents and purposes can also be termed as an order of the court. Given the nature of the applicant's application and the purported breach of court order by the respondents, I find that there was no need for the applicant to seek leave before instituting the contempt of court proceedings as the basis of the contempt emanates from a breach of the court order.

24. The 3rd respondent's claim that he was not personally served with the court order 6th October 2015 cannot stand as put by **Lenaola J in Basil Criticos v Attorney-General and 8 Others [2012] eKLR it was held: -**

".....the law had changed and as it stands today knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a court order; the strict requirement that personal service must be proved is rendered unnecessary."

25. It is now trite law therefore that service of the judgment or order alleged to have been breached and the penal notice served upon the advocate representing the person being charged with the contempt of court is sufficient service unless it can be proved that the advocate did not notify the client. The Court of Appeal had the following to say on this subject in the case of **Shimmers Plaza Limited v National Bank of Kenya Limited Civil Appeal No. 33 of 2012: -**

"There is an assumption which is not unfounded and which in our view irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case. This is the position in other jurisdictions within and outside the common wealth."

26. Taking a cue from the above decisions, I find that the 3rd respondent cannot turn around and say that he was not served with the Tribunal's order dated 6th October 2015, while in the same breath, he acknowledges that the 2nd respondent had obtained an order of stay of execution of the tribunal's impugned orders.

27. In the end, having found that it is not necessary for the applicant to apply for leave to institute contempt of court proceedings for disobedience of a court order, I direct that the applicant can proceed and institute the contempt of court proceedings should he deem it necessary.

28. Each party to bear their own costs in this application.

Dated, signed and delivered in open court this 26th day of JULY, 2017

HON. W. A.OKWANY

JUDGE

In the presence of:

- N/A for the Applicant
- N/A for the Respondents
- Omwoyo court clerk