



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC CIVIL APPLICATION NO. 10 OF 2016

IN THE MATTER OF AN APPLICATION BY MONICA KAJUJU FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

-AND-

IN THE MATTER OF THE MERU COUNTY ALCOHOLIC DRINKS CONTROL ACT 2014

-AND-

IN THE MATTER OF AN APPLICATION BY MONICAH KAJUJU t/a SUNRISE TO SUNSET BAR FOR RENEWAL OF AN ALCOHOLIC DRINKS MERCHANTS' LICENCE FOR THE YEAR 2016.

-AND-

IN THE MATTER OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

MONICAH KAJUJU t/a

SUNRISE TO SUNSET BAR.....APPLICANT

-VS-

THE CHAIRPERSON, MERU

COUNTY ALCOHOLIC DRINKS CONTROL BOARD..... 1ST RESPONDENT

CHIEF INSPECTOR RAPHAEL

MUTUA O.C.S MITUNGUU POLICE STATION..... ALLEGED CONTEMNOR

RULING

Contempt of court

[1] By a Notice of Motion Application filed in court on 11th May 2015, the Applicant has sought the following orders:

1. THAT the Officer in charge O.C.S Mitunguu Police Station Chief Inspector Raphael Mutua do show cause why he should not be punished for disobeying the orders of this honourable court dated 31st March 2016.

2. THAT the costs of this application be provided for.

Directions

[2] When the matter came up for hearing on 8th September 2016, it was agreed that it be canvassed by way of written submissions. I will therefore consider the pleadings as well as submissions of parties thereto.

Applicant: OCS acted contrary to court order

[3] The application *inter alia* alleges that the alleged contemnor failed to comply with the orders of this court dated 31st March 2016 despite having knowledge and notice of the said orders. In so acting, he undermined the authority and dignity of this court. Brief facts are that; on 31st March 2016, this court granted her Leave to commence Judicial Review proceedings against the Respondent herein and further ordered that she should continue operating her business subject to the conditions in licence No. 000401. She stated that on the same date she went to the office of O.C.S Mitunguu Police Station and personally handed a copy of the order to him. She further contended that on 28th April 2016, the O.C.S came to her premises and personally arrested her on the allegation that she was operating a bar without a licence and had her arraigned in court on 29th April 2016, with the offence of selling alcoholic drinks without a licence. She denied the charges.

[4] The Application was opposed by the alleged contemnor via a Replying Affidavit filed in court on 24th May 2016, where he deposed *inter alia* that the Applicant was on 28th April 2016 at around 10:35pm, found to be selling illicit liquor “*Nguso*” near her registered premises. And that were contrary to Section 7 (1) (b) as read with Section 62 of the Alcoholic Drinks Control Act. Thereafter, she was arraigned in court on 29th April 2016 and charged with the offence thereto. And during plea-taking the Applicant denied the charges prompting an examination of the exhibits at the Government Chemist- the results showed that the liquid examined was traditional liquor within the meaning of the Alcoholic Drinks Control Act No. 4 of 2010. The Applicant was never licensed to sell traditional liquor. Therefore, according to him, contempt of court cannot arise. Again, he stated that he was never a party to MISC APPL NO. 10 of 2016 and that as such no order was issued against him or served upon him as evident from the proceedings.

Submissions by the Applicant

[5] It was submitted for the Applicant that the Respondent’s defence herein cannot stand for the following reasons;

(a) The Applicant had categorically denied that she was arrested for selling illicit brew, that the illicit brew that was taken to the Government Chemist came from her premises;

(b) Whereas it was true that the Respondent was not a direct party in these proceedings, he was an interested party and it was on this basis that he was served with the court orders and there was sufficient disposition that he had knowledge of the court order; and

(c) Whereas it was true that the Respondent may not have been properly served, (because the Applicant was not a process server) he had knowledge of the orders.

Submissions by the alleged Contemnor

[6] The Respondent argued that the order of 31st March 2016, only allowed the Applicant to sell alcoholic drinks allowed under the Alcoholic Drinks Control Act. The alcoholic drinks that were seized by the Respondent from the Applicant's premises were analyzed and certified by the Government Chemist to be in the definition of traditional liquor which the Applicant had no license to sell. It was further submitted that by being in possession of and selling Nguso, maize beverage in her premises, the Applicant committed an offence for she was not licensed to possess or sell Nguso beverage. The Respondent contended thus that the beverage is an ingredient used in manufacturing an alcoholic drink and that it is mixed with water and other ingredients to produce alcoholic brew. The Applicant had no licence to manufacture any brew; the process of mixing Nguso beverage to make an alcoholic drink was not within the Applicant's license.

DETERMINATION

Standard of proof

[7] These are contempt of court proceedings. The alleged contemnor may be deprived of his precious liberty. Therefore, it is imperative that the offence of contempt of court *must be satisfactorily proved on a standard higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. On this see the case of Gatharia K. Mutikika vs Baharini Farm Ltd {1985} KLR 227, where it was held as follows:-*

"The Courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved... It must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. it is not safe to extend it to offence, which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. A judge must be careful to see that the cause cannot be mode of dealing with persons brought before him. Necessary though the jurisdiction may be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found... Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt..... it is competent for the court where a contempt is threatened or has been committed, and on an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not."

Applying the test

[8] Applying the above test, and upon careful consideration of this Application and the rival submissions by the parties, I take the following view of the matter. On 31st March 2016, this court ordered *inter alia* that; *"the ex-parte Applicant shall continue to operate the business subject to the conditions of the licence No. 000401 issued on 28th April 2014, pending the filing of the substantive Notice of Motion herein and its subsequent hearing and determination"*. However, the exact conditions contained in licence No. 000401 were not made available to the court. Now, it has been contended by the Respondent that the alcoholic drinks that he seized from the Applicant's premises were found to be within definition of traditional liquor for which the Applicant had no licence to sell. The Applicant however denied that the said product was seized from her premises. She did not say what liquor was seized from her premises if at all, and the exact manner the OCS contravened order of 31st March 2016. Moreover, she did not claim that licence No. 000401 authorized sale of traditional liqueur of the type seized. There is already a

dilemma on the court. Again, service of the order in question is also in issue. These are important considerations in a proceeding such as this.

[9] But before I render my final decision on this matter, I wish to dispel one mistaken notion. A party need not be a party in the suit to be cited for contempt of court. Having state thus, I will now tackle the allegation of non-service of the order in issue upon the OCS. Service of the order in question has been denied. In fact the Applicant has admitted that there was no proper service of the order upon the alleged contemnor. I am aware that a person who has knowledge of a court order may be cited and convicted for contempt of court. But in this case, it is not clear that the alleged contemnor had knowledge of the order dated 31st March 2016. In any case, such other matter as the Appellant was arrested and charged in court for being in possession of and selling illicit brew called Nguso only adds to the conjecture in this case. Arguments have been advanced that she was not licensed to brew traditional brew or to manufacture or possess material to manufacture traditional brew. The Government Chemist certified Nguso to be traditional brew. Although she denied those charges, she ought to have shown the type of liquor covered by the conditions in license No. 000401 and the precise acts which constitute disobedience of the court order by the OCS. None of these things is clear. Too many things remain in doubt and I should resolve the doubt in favour of the person cited for contempt. In the absence of cogent evidence to prove contempt to the required standard, this application must fail. Accordingly, I dismiss the Applicant's Notice of Motion Application filed in court on 11th May 2015. Given the circumstances of this case, I make no order as to costs. It is so ordered.

Dated, signed and delivered in open court at Meru this 30th day of October

2017

F. GIKONYO

JUDGE

In the presence of:

Mr. Ondieki advocate for Mr. Kariuki advocate for applicant

Mr. Laichena Mugambi for 1st Respondent –absent

Attorney General for alleged contemnor –absent

F. GIKONYO

JUDGE