



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CIVIL CASE NO 13 OF 2014**

**North Tetu Farmers Co. Ltd.....Plaintiff/Applicant**

**versus**

**Joseph Nderitu Wanjohi.....Defendant/Respondent**

**RULING**

By a notice of motion dated 22.5.2015, the plaintiff/applicant moved this court under the provisions of **the Judicature Act**, Order **40** Rule **4** of the Civil Procedure Rules, 2010 & Rules of the Supreme Court seeking an order that the defendant/Respondent be committed to civil jail for a period not exceeding six months or attach his property or impose such penalty as the court may deem fit for contempt of court for disobeying the orders of this court dated 29th May 2014 and confirmed on 9.7.2014. (The application also makes reference to Rule 31 (2) of the Industrial Court Rules. I am not able to discern the applicability of the said Rule to this case).

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.*

Discussing the procedure for instituting Contempt proceedings in Kenya, **Odunga J** in the case of *John Mugo Gachuki vs New Nyamakima Co. Ltd* 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."*

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* 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)

Discussing the procedure in England, the Court of Appeal in *Christine Wangari Chege vs Elizabeth Wanjiru Evans & Others* 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 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.*

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.

However, following the implementation of the famous Lord Woolf's "Access to Justice Report, 1996", The Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rules, 1999. On 1.10.2012, 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."

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.

In the above cited case of *Christine Wangari Gacheche* 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.

The jurisdiction relating contempt of court proceedings, as decided cases suggest is rather problematic It appears that Kenyan courts have to continuously and perpetually check upon the current law in force in England and apply it in exercise of this jurisdiction. This is both the substantive and procedural law applicable in England as at the time the contempt is committed.

In the applicants application dated 22.5.2015, the applicant seeks to have the Defendant/Respondent committed to civil jail for a period not exceeding 6 months or attach his property or impose such other penalty as the court may deem fit for contempt of court for disobeying the court orders dated 29.5.14 and confirmed on 9.7.14. The grounds relied upon are that the respondent '*has been presenting, passing off and conducting himself as a director and chairman of the applicant/plaintiff in flagrant breach of the orders of this court, which actions are likely to bring disrepute to the dignity and authority of this court.*'

The applicant avers in the supporting affidavit that on 29.5.2014 this court issued an injunction restraining the Respondent from presenting himself or passing himself off or representing himself as a director or chairman of the applicant and also barring him from holding, convening or holding any meetings or operating in any office in Nyakuki in the name of the applicant. The said order was confirmed on 9.6.2014. The applicant states that the Respondent in total disregard of the said order opened an office at Mt. Kenya Distributors Building in Nanyuki Town and has been presenting himself as a director or chairman of the applicant. In support of the said averment, photographs have been annexed showing the alleged business bearing the applicants name.

The Respondent in his replying affidavit admits knowledge of the existence of the said order, and insists

that he has fully observed the terms of the said order and specifically denies presenting himself as a director of the plaintiff as alleged or conducting the alleged business. He also denies holding or convening any meetings as alleged. He also denied operating offices in Nanyuki in the applicants name s alleged. He asserts that the documents relied upon are of no evidential basis and cannot show the persons operating the alleged business, nor does it show when such operations took place. He insisted that he is a stranger to the documents relied upon in the application and cast doubts on them. He admits writing the letter dated 5.6.2014 but avers that the same was written before the orders were confirmed.

In a further affidavit filed on 25.11.2015, the applicant insisted the Respondent continues to sign documents and presenting himself as the chairman of the applicant and annexed some more documents purported to have been signed by the respondent.

Both counsels filed written submissions and cited authorities. The applicants counsel insisted that the Respondent has breached and continues to be in breach of the court order and urged the court to grant the orders sought while the Respondents counsel insisted that this application was brought merely to delay the determination of the case, that the applicant has not proved the alleged contempt.

Section **63** of the Civil Procedure Act provides as follows:-

*" In order to prevent the ends of justice from being defeated the court may, if it so prescribed-*

*a.*

*b.*

*c. Grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property to be attached and sold.*

*Under Order 40 Rule 3 of the Civil Procedure Act, in case of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.*

According to *Black's Law Dictionary*;

*" Contempt is a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."*

In *Halsbury's Laws of England* it is stated:-

*"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachment .....an application to court by him not being entertained until he had purged his contempt"*

In book *The Law of Contempt* learned authors **Nigel Lowe & Brenda Sufrin** state a follows:-

*"Coercive orders made by the courts should be obeyed and undertakings formally given to the courts should be honoured unless and until they are set aside. Furthermore it is generally no answer to an action for contempt that the order disobeyed or the undertaking broken should not have been made or accepted in the first place. The proper course if it is sought to challenge the order or undertaking is to apply to have it set aside."*

In *Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another*

**Ibrahim J** (as he then was) stated as follows:-

*"It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of whom, an order is made by Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void."*

Contempt proceedings are *quasi-criminal* in nature and since the liberty of a person is at stake, the standard of proof is higher than in civil cases. This principle was reiterated in the case of *Gatharia K. Mutikika vs Baharini Farm Ltd* 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... I 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."*

In *Peter K. Yego & Others vs Pauline Nekesa Kode* the court recognizing that contempt of court is criminal, held that it must be proved that one has actually disobeyed the court order before one is cited for contempt. The applicant in a application for contempt must prove beyond peradventure that the respondent is guilty of contempt.

The High Court of South Africa in the case of *Kristen Carla Burchell vs Barry Grant Burchell* held that in order to succeed in civil contempt proceedings, the applicant has to prove **(i)** the terms of the order, **(ii)** Knowledge of these terms by the Respondent, **(iii)**. Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities

Writing on proving the elements of civil contempt, learned authors of the book *Contempt in Modern New Zealand* have authoritatively stated 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.

Although the proceedings are civil in nature, it is well established that an applicant must prove the elements beyond reasonable doubt, at least higher than the standard in civil cases. The fact that the liberty of the defendant could be affected means that the standard of prove is higher than the standard in civil cases. It is incumbent on the applicant to prove that the defendant's conduct was deliberate in the sense that he or she deliberately or willfully acted in a manner that breached the order.

The prayer sought is for committal for contempt or attachment of the defendants property. Useful guidance can be obtained in the New Zealand case of *Morris vs Dougl* where **Peterson J** discussing an order of this nature explained the nature and effect of a *sequestration* order:-

*"It is generally considered to be a writ of last resort and it is coercive in its function rather than punitive. It is available only where the person against whom it is sought to be issued is in contempt of court through having willfully disobeyed its order. If the writ does issue, it temporarily places property of the contemnor into the hands of the sequestrators and denies him the right to enjoy or dispose of the property until a further order of the court. ....As the writ is very drastic in form, the courts have generally been reluctant to allow the writ to issue except in the clearest cases and will not normally issue the writ unless the conduct has been intentional or reckless. The conduct must be shown to be willful..." (Emphasis supplied)*

The power to commit for contempt is one to be exercised with great care. An order committing a person to prison for contempt is to be adopted only as a last resort.

In the present case the terms of the order is not in dispute. Knowledge of the order is not disputed. What is contested is the alleged disobedience. The Respondent insists that he has not disobeyed the order in question. He denies operating a business in Nanyuki as alleged. The photograph annexed shows the name of the plaintiff company written on what is said to be a business premises. However, there is no evidence linking the defendant with the operations in the alleged business nor does the photo shed light on the nature of the business inside the said premises. The evidence tendered does not show that the defendant held, conducted, convened any meeting as prohibited by the order.

This leaves us with the letters annexed to the further affidavit allegedly written by the defendant signing as the chairman of the plaintiff company. I have interrogated the said letters and considering the higher standard of prove in contempt cases, I find it unsafe to base an order for committal on contempt on such letters especially so when it cannot be said with degree of certainty required in cases of this nature that truly such letters emanated from the defendant. The burden of proving the authenticity of the said letters to the required standard lies with the plaintiff and the mere fact that the letters bear the defendant's name and alleged signature is not sufficient. It was necessary to prove that the said letter were authored by the defendant. As pointed out earlier, in an application of this nature we are dealing with the liberty of a person and such an order ought to be granted in the clearest circumstances as evidently demonstrated by the authorities cited herein.

In the instant application I am not satisfied that that standard of proof has been attained. Having so concluded, I hereby dismiss the application dated 22.5.2015 with no orders as to costs.

Orders accordingly

Dated at **Nyeri** this 27<sup>th</sup> day of January 2016

**John M. Mativo**

**Judge**