



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL MISCELLANEOUS APPLICATION NO. 462 OF 2014

MOSES ONGONGA NYABINDA.....APPLICANT

VERSUS

SHAMSERALI HUSSEIN..... RESPONDENT

RULING

1. On 15.5.2015, this court convicted Shamshetali Hussein (2nd Respondent) for contempt of court orders. This court also issued an order directing the officer in charge of Industrial area Police Station to apprehend and bring the 2nd Respondent to this court for sentencing. On 28th may 2015, the court record does not indicate that the matter was placed before court on 28.5.2015. It however shows that the matter was listed before this court on 18th June 2015 when this court issued an order directing the file to be placed before it to enable it confirm whether the O.C.S, Industrial Area Police Station, has effected the warrant of arrest. The file was eventually placed before this court on 9th July 2015 when Mr. Okao, Learned advocate for the Plaintiff/Applicant stated that the O.C.S Industrial Police Station had failed to execute the warrant of arrest despite having been served with the warrant of arrest to execute. When the file came up for mention on 29.7.2015, Mr. Okao expressed his frustrations in having the warrant of arrest executed by the O.C.S of Industrial Area Police Station. Mr. Okao's revelation prompted this court to issue summons directing C.I.P Shamalla, the O.C.S of the aforesaid police station to personally appear before this court on 5.10.2015 to show cause why he should not be punished for failing to effect the warrant of arrest against the 2nd Respondent.
2. The record shows that the file was not placed before this court on 5th October 2015 but was instead mentioned on 3rd November 2015. On that date Mr. Malinzi learned advocate for the 2nd Respondent appeared before this court and informed this court that his client, the 2nd Respondent was sick. He also claimed that the warrant of arrest was irregularly issued. Mr. Malinzi was granted permission to file an affidavit to explain why he thought the warrants of arrest were irregularly issued. The matter was subsequently mentioned on 20.11.2015 and on 10.02.2016.
3. Learned counsels were invited to make oral submissions on 16th February 2016. Mr. Malinzi pointed out that the 2nd Respondent was out of the country when this court issued a warrant of arrest on 15.5.2015. He also stated that it is the 2nd Respondent's son who was served instead. He urged this court to set aside the warrant of arrest because the 2nd Respondent willingly submitted himself to the jurisdiction of this court without being apprehended and dragged to court by police. Mr. Malinzi further argued that his client was not in contempt. He stated that the 2nd Respondent was in a position to demonstrate that he was not served and that if he had been served he would have been in a position to explain himself out and show that he did not breach any court

order.

4. Mr. Okao, learned advocate for the Plaintiff Applicant informed this court that what was before this court was the question of sentencing. He argued that this court became *funtus officio* upon the delivery of its ruling on 15.5.2015. The learned advocate pointed out that the 2nd Respondent was actually served and was prompted to appoint the firm of Kwengu & Co. Advocates to represent him hence his denial of service does not stand.
5. After a careful consideration of the rival submission two divergent arguments have arisen.

First, is the position taken by Mr. Malinzi. It would appear from his arguments that he is challenging both the order of conviction and the issuance of a warrant of arrest. He has claimed that this court gave him permission to file an affidavit to explain why the 2nd Respondent should not be arrested. He argued that he was not served with the application and that the 2nd Respondent was out of the country to seek medical attention.

Secondly, Mr. Okao has taken the position that this court should not entertain the 2nd Respondent's arguments because it became *funtus officio* the moment it pronounced its ruling of 15.5.2015.

6. I have already stated that on 15.5.2015, this court delivered a ruling in which the following orders *inter alia*:

- i. **That the 2nd Respondent namely Shamsherali Hussein is guilty for contempt of court**
- ii. **A warrant of arrest is issued to be executed by the O.C.S Industrial police station who should apprehend and bring him to this court for sentencing.**

7. With respect, I agree with the submissions of Mr. Okao that this court became *funtus officio* from the time it delivered its ruling. In other words it was barred from entertaining any arguments which seeks to challenge the merits of the decisions convicting the 2nd Respondent for contempt of court. The only way this court can go back there is by way of review which is not the case here. If well advised, there is also the avenue of appeal. For this reason I uphold the preliminary objection raised by Mr. Okao and decline to further entertain any arguments that tends to undermine the order of conviction.
8. Perhaps the order which this court has a wide discretion to entertain any time is the order of warrant of arrest. At the time of delivering the ruling which convicted the 2nd Respondent for contempt of court, the 2nd Respondent and his counsel were absent from court. The law and practice dictates that a person who has been convicted for contempt should be given a chance to mitigate before being sentenced. In other words his presence is crucial so that the court can pronounce the appropriate sentence.
9. This court issued a warrant of arrest to command the presence of the 2nd Respondent with the assistance of police. The police have the coercive power to apprehend and bring such contemnors to court. In the matter before this court, this court had directed the O.C.S Industrial police station to execute the warrants of arrest by apprehending the 2nd Respondent and presenting him before this court. The aforesaid O.C.S appears to have failed to execute the warrants thus prompting this court to issue summons requiring the O.C.S to personally appear before this court to show cause why he should not be punished for disobeying a court order. It is only after this court issued summons that the 2nd Respondent and his counsel appeared in court. It is curious that the O.C.S Industrial police station has not deemed it fit to honour those summons. This is a worrying trend which if not checked will undermine the rule of law in this country. I can only make inference that when the O.C.S discovered that he will be required to be personally liable in executing that he advised the 2nd Respondent to appear before court thus obviating the necessity of having

the warrants of arrest being executed.

10. Since the 2nd Respondent has regularly presented himself in court after getting proper advise there is no need to maintain the warrant of arrest.

11. I hereby set aside the same. However, the same may be reissued if the 2nd Respondent fails to avail himself in court.

12. Mr. Okao, has submitted that what is pending before this court is the question of sentencing. With respect, I entirely agree with him. The 2nd Respondent has already been convicted. He is now required to make submissions in mitigation. If he is not in a position to do so, then he will be given time to prepare himself.

13. If he takes the later option, then he should offer security as bond/bail for his attendance otherwise he may risk being kept in custody awaiting sentencing.

Dated, Signed and Delivered in open court this 19th day of February, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent