



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.175 OF 2015

BETWEEN

WINNIE MUTHONI MBURU.....1ST PETITIONER
STEPHEN KAMAU CHEGE.....2ND PETITIONER
JOSEPH NGUGI MUNGAI.....3RD PETITIONER
PAUL MUGO KIMANI.....4TH PETITIONER
SALYVIAH WAMAITHA MAINA.....5TH PETITIONER
JOHN MUCHIRI NDERU.....6TH PETITIONER
ELIUD KIMANI KAMANDE.....7TH PETITIONER
ROSEMARY MUTINDA MATHAKA.....8TH PETITIONER
PAULINE MWERU WATHIGA.....9TH PETITIONER
JOSEPH KURIA.....10th PETITIONER
BENSON KAMAU.....11th PETITIONER
DUNCAN JUSTUS KAREITHI.....12th PETITIONER
DANIEL KAMAU GACOKA T/A KAMPESI13th PETITIONER
JAMES MATHENGE WAMWANGI.....14th PETITIONER
ELIUD GATHAIGA WAMWANGI.....15th PETITIONER
MARGARET NDUTA MUIRURI.....16th PETITIONER
DAVID MWANIKI MATHAYA17th PETITIONER

STEPHEN MUCHOKI MWANGI.....18th PETITIONER
RACHEL NYAMAUTU MWANGI.....19th PETITIONER
KENNETH KINYANJUI MUHIA.....20th PETITIONER
NANCY RINA WANJIRU MBUGUA.....21st PETITIONER
JANE NYAMBURA MBURU.....22nd PETITIONER
PERMINUS NJANE KINYANJUI.....23rd PETITIONER
ANN MUMBI MUTHAMI.....24th PETITIONER
JOHN KARIBU KANG'ERI.....25th PETITIONER

AND

NAIROBI CITY COUNTY.....RESPONDENT

AND

WILLIAM KANGOGO..... 1ST ALLEGED CONTEMNOR
STEPHEN WAWERU NJORU..... 2ND ALLEGED CONTEMNOR
PATRICK MISIGO.....3RD ALLEGED CONTEMNOR
CHARLES AKOKO..... 4TH ALLEGED CONTEMNOR
JAIRUS BASWETI.....5TH ALLEGED CONTEMNOR
LOCHENIA IGHOT..... 6TH ALLEGED CONTEMNOR
AKASS ABAN.....7TH ALLEGED CONTEMNOR

RULING

Factual background

(1) On 10th June 2015, the Petitioners filed an application dated 9th June 2015 under a certificate of urgency and in that application they prayed for the following orders:

“1. ...

2. That this honourable court be pleased to issue an order enjoining the 1st – 8th alleged contemnors as parties in this Petition for purposes of contempt of Court proceedings.

3. That an order of committal be made against WILLIAM KANGOGO, STEPHEN WAWERU NJOGU, PATRICK MISIGO, CHARLES AKOKO, JAIRUS BASWETI, LOCHENIA IGHOT AND AKASS ABAN hereinto prison for such period as this Honourable

Court may deem fit and just in that the said WILLIAM KANGOGO, STEPHEN WAWERU NJORU, PATRICK MISIGO, CHARLES AKOKO, JAIRUS BASWETI, LOCHENIA IGHOT AND AKASS ABAN have disobeyed the order made herein by this Honourable Court, (Hon. Lady Justice Mumbi Ngugi) on 7th of May 2015.

4. That this Honourable Court be pleased to order the immediate release of any stock in trade belonging to the 2nd, 3rd, 18th, 20th Petitioners and any other Petitioner.

5. That cost of this application be provided for.”

(2) The factual basis of the Application is detailed in the Statement of Facts dated 9th June 2015 and the Supporting Affidavit of the 18th Petitioner sworn on the same date. These facts are that on 30th April 2015, the Petitioners filed the present Petition under a certificate of urgency together with an application seeking certain interim reliefs. The matter was heard ex-parte and the Court ordered the Petitioners to serve the Respondent and come back for hearing on 7th May 2015.

(3) It is the Petitioners' position that before the hearing date aforesaid, the Alleged Contemnors continued harassing, arresting, and intimidating them and confiscated their trading stock which led them to file an Affidavit on 6th May 2015 detailing these alleged violations. On 7th May 2015, at the inter-partes hearing of the said Application, this Court recorded an order by consent the terms of which read thus:

“1 That pending the hearing and determination of this Petition, the Petitioners are hereby allowed to trade freely in the areas prescribed by their respective licenses.

2. That this Petition be mentioned before Hon. Justice Isaac Lenaola on 26th June, 2015 with a view to consolidating it with Petition No. 92 of 2015 and Petition No. 135 of 2015.”

(4) The Petitioners allege that despite the existence of the above orders, the Alleged Contemnors continued interfering with their business operations by intimidating, harassing and arresting them and confiscated their trading stock.

(5) They further allege that on 13th May 2015, the Alleged Contemnors, led by the 1st Alleged Contemnor, went to the 3rd, and 18th Petitioner's as well as Kenneth Kinyangu's business sites and confiscated their respective trading stock. The value of the trading stock respectively is alleged to be Kshs.150, 000, Kshs.120,000, Kshs.10, 000 and Kshs. 90, 000. The stock which was packed in the 1st Respondent's motor vehicle bearing Registration No. KAM 032P was then taken to an unknown destination.

(6) They also allege that on 21st May 2015, the Alleged Contemnors, led by the 4th Alleged Contemnor, went to the 6th Petitioner's place of business and confiscated his trading stock valued at Kshs.150, 000 and took them to an unknown destination using the 1st Respondent's motor vehicle registration No. KAM 032P. On the same date, the Alleged Contemnors led by the 2nd Alleged Contemnor, went to a certain Margaret Ndotu and confiscated her trading stock allegedly amounting to Kshs 50, 000 which was taken to an unknown destination in the 1st Respondent's motor vehicle bearing Registration No.KAM 032P.

(7) The Petitioners further state that the Alleged Contemnors later arrested the 8th, 15th and 18th Petitioners in their respective business sites, intimidated and harassed them and the 18th Petitioner was arraigned in **Chief Magistrate's Court at City Court case No 7445 of 2015** on 2nd June 2015 but he was unconditionally released upon application by his advocate. The 15th Petitioner's case i.e. **Chief Magistrate's Court at City Court Case No. 7430 of 2015** was scheduled for a mention on 11th June 2015.

(8) Against the above background, the Petitioners argue that the overall conduct of the Alleged Contemnors was unlawful and violated the orders set out above hence the present Application. On 2nd of September 2015, they also filed written submissions in support of the application and framed the questions for determination as follows:

- i. What amounts to contempt of court?
- ii. Whether the alleged contemnors were in contempt of court.
- iii. Whether the matter was properly before the court.
- iv. Was personal service required in contempt of court proceedings?

(9) After an analysis of the applicable law, the Petitioners answered all of the above questions in the affirmative. However, in my view the only issue that arises for determination is question No. (ii) ? that is whether the Alleged Contemnors are in contempt of Court as an answer to that question will effectively answer all the others. I should note at this stage that from the record, although served, the Respondent filed no response to the Application.

Applicable law

(10) **Section 5(1) of the Judicature Act, Chapter 8 Laws of Kenya** is the substantive law on contempt of court that confers this Court with the power to punish for contempt of court. The said Section 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 such power shall extend to upholding the authority and dignity of subordinate courts.”

(11) The above provision was applied in **Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 Others [2014] eKLR** and this Court also captured the legal position regarding contempt in **Basil Criticos vs Attorney General & 8 Others & 4 others [2012] eKLR** where it pointed out that while the substantive law and power to punish for contempt are granted by the **Judicature Act**, the procedural law is to be found in contemporary English law of civil contempt as it changes from time to time. Presently, that law and procedure is retained in the **Rules of the Supreme Court in Schedule 1 of the Civil Procedure Rules**. The same position was further reiterated in **Sam Nyamweya & 3 others v Kenya Premier League Limited & 2 others [2015] eKLR** where the Court stated that **“Section 5 of the Judicature Act, Chapter 8 Laws of Kenya is the substantive law on contempt of court”**.

Application of the Law to the present facts

(12) The law as set out above does not prescribe the exact test applicable in cases of contempt and over the years, the courts have developed a common standard in that regard. The point of departure has however been whether an alleged contemnor knowingly disobeyed a clear and unambiguous order in the circumstances of his case.

(13) In this case, it is not in dispute that there was a clear court order and the only question is whether the Alleged Contemnors knowingly disobeyed those orders.

(14) To answer that question, I must address the issue whether personal service is mandatory in every case where contempt of court is claimed. To my knowledge, the current trend of jurisprudence in Kenyan courts is that personal service is not a strict requirement and that knowledge of the existence of the orders suffices. That is why in **Kenya Tea Growers Association v Francis Atwoli & 5 others [2012] eKLR** the Court pointed out that **“Courts seem to have moved steadily towards the position that although Order 52 Rules 3 and 4 of the Supreme Court Practice Rules of England would point towards personal service as a factor in determining contempt, in fact knowledge of an order is higher than**

service”.

(15) The same finding was reiterated in **Basil Criticos v Attorney General & 8 others & 4 others [2012] eKLR** where the Court said that **“the law has changed and as it stands today knowledge supersedes personal service and for good reason”** and added that **“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”**.

(16) The aforesaid position was also recently confirmed in **Sam Nyamweya (Supra)**. In that case, after finding that there was no personal service, the Court stated:

“Having ruled out the issue of personal service as not having been proved, I now turn to the question of whether the respondents herein had knowledge of or were aware of the said order.”

(17) The above statement is indicative of the fact that a case may arise wherein an alleged contemnor has not been personally served with the order of the Court but has become aware of its existence in one way or another. In this case, it is not in dispute that there was no personal service of the orders on the Alleged Contemnors because the orders were served on the 1st Respondent through its advocate and none of the Alleged Contemnors was in any event party to the proceedings. The question that now arises is therefore whether the Petitioners have proved that the alleged contemnors had knowledge of the existence of the orders.

(18) In addressing that issue, it is now settled law that a Petitioner in contempt cases must *prove beyond reasonable doubt* that the alleged contemnor has violated an existing court order. The reason for adopting such a high standard is not hard to find. In **Sam Nyamweya (supra)** the Court pointed out **“that contempt proceedings are of a criminal nature and involve, if proved, loss of liberty. The applicant must therefore endeavour to prove all facts relied on by way of evidence beyond reasonable doubt”**.

(19) The same finding was reiterated in **Duncan Manuel Murigi v Kenya Railways Corporation [2008] eKLR** where the Court pointed out that **“contempt proceedings are criminal in character and the standard of proof is much higher than in civil cases. The contemnor if the application is allowed stands to lose his liberty and go to prison”**.

(20) In that context, it should be noted that Nairobi City County was the only Respondent when the court order was issued and although the order was also presumed to be applicable to its servants, employees, and such other persons, it is not known whether, having been served with the aforesaid order, it went on to communicate it with all its officials including the Alleged Contemnors, who are its employees.

(21) Further, in two letters dated 13th May 2015 and 25th May 2015 respectively, the Petitioners’ Advocate wrote to the then Advocate for the 1st Respondent advising him to alert the Alleged Contemnors that they are violating the existing order. However, there is no record of any further communication indicating that either before or thereafter, the Alleged Contemnors were alerted of the existing court order.

(22) In the absence of direct evidence pointing to the fact that the Alleged Contemnors had received communication concerning the court orders, the Petitioners’ case is left hanging merely on the assumption that because the 1st Respondent was served with the aforesaid order, it must have disseminated it or in some way communicated to its officials at various departments. Is this enough evidence to prove the case beyond reasonable doubt? I think not.

(23) In saying so, I take judicial notice of the fact that the 1st Respondent is a huge institution with various departments and without further evidence that the orders were communicated or disseminated to the Alleged Contemnors, one cannot conclude beyond reasonable doubt that all of the 1st Respondent’s officials including the Alleged Contemnors were aware of the aforesaid orders. In my view, this alone

deals a death blow to the Petitioners' Application.

(24) Having so said, is there need to join the Alleged Contemnors to the present proceedings? **Rule 5(d)** of the **High Court (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules** provides as follows:

“The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just?

(i) order that the name of any party improperly joined, be struck out; and

(ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.”

(25) Are the Alleged Contemnors necessary Parties to be joined to these proceedings? I doubt so. They cannot be joined merely because they are to be cited for contempt. They should be joined, if all, in the totality of the issues raised in the Petition.

(26) Had they been served with the orders in issue or had these orders otherwise come to their knowledge, they would have then been cited for contempt as employees of the 1st Respondent. The Petitioners failed to follow up on their letters to counsel for the 1st Respondent and so that channel was closed.

Conclusion

(27) Turning back to the Prayers in the Application, Prayers 2 and 3 are dismissed based on the exposition above. Regarding Prayer 4, once I have declined the invitation to join the Alleged Contemnors to the present Petition, final orders for release of the alleged trading stock cannot be an issue to be addressed in the present proceedings.

(28) As regards costs, although they ordinarily follow the event, in the present Application such an order would not be realistic. Let each Party therefore bear its own costs.

Disposition

(26) The Application dated 9th June 2015 is devoid of merit and is dismissed. Let each Party bear its own costs.

(27) Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF APRIL, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Kimathi holding for Petitioners

Mr. Ilako for Respondent

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE

Further Order

Mention on 17/5/2016 to enable filing of Submissions.

ISAAC LENAOLA

JUDGE