



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 4 OF 2013

IN THE MATTER OF: AN APPLICATION BY WYCLIFFE SAYIA

OKUNGU FOR LEAVE TO ISSUE OF ORDERS OF MANDAMUS

AND

**IN THE MATTER OF: EXECUTIVE PROCEEDINGS IN THE COURT OF APPEAL OF
KENYA AT KISUMU**

AND

**IN THE MATTER OF: (1) PERMANENT SECRETARY OFFICE
OF THE PRESIDENT PROVINCIAL ADMINISTRATION & INTERNAL SECURITY**

(2) ATTORNEY-GENERAL

BETWEEN

1. WYCLIFFE SAYIA OKUNGU.....APPLICANT

VERSUS

JOEL KAYERI RISAMIRA

NELSON RAVAZA KINYANGI

DISTRICT LAND SURVEYOR - VIHIGA

THE ATTORNEY GENERAL.....RESPONDENTS

RULING

1. In his Notice of Motion dated 6th November, 2015 and filed on 10th November, 2015 Wycliffe Sayia Okungu (the Applicant) sought that –

(a) the Inspector-General of Police be committed to jail for contempt of court for disobedience and/or failure to enforce the warrant of arrest in Execution issued by the court on 15th May, 2015

against the Principal Secretary, Office of the President/Provincial Administration and Internal Security;

(b) the said Inspector-General of Police do pay the costs of the Application.

2. The Applicants claim is that despite the award of some Kshs. 515,840/= in the principal award, the said sum had now grown to Kshs. 984,030/30 and was still accruing interest. The Applicant claims that despite the orders of mandamus, given to compel the Principal Secretary to pay, no payment had been made to settle the Applicant's claim. The Applicant therefore feels that in the circumstances, the only way to compel the Principal Secretary to pay, is to have him/her arrested and brought to court to show cause why he should not be committed to jail for disobeying a court order.

3. The only person, the Applicant claims, who can arrest the Principal Secretary is the Inspector-General of Police or that only he can give command on the arrest of the Principal Secretary. The Applicant claims that despite service by registered post the Inspector-General of Police has not acted upon the order, and has therefore sought a further order to have the Inspector-General of Police himself arrested and committed to jail.

4. The Respondent, the Attorney-General has through the Replying Affidavit of H. Kipkosgei Barmao, a Deputy Director of Operations opposed the application for arrest of the Inspector-General of Police, while admitting the Applicant's claim for Kshs. 984,030/3-, this Director depones that the Applicant was paid Kshs. 258,089.80 and the balance was awaiting budgetary allocation.

5. The deponent however denies the service of any process upon the Inspector-General of Police, by registered post as alleged by the Applicant's counsel, or otherwise, and the letter attaching the warrants was never received by the Office of the Inspector-General of Police, and thus was unable to comply with orders of court.

6. In addition to these pleadings, counsel also filed written submissions in support of their respective positions. The Applicant's counsel's written submissions are dated 18th August, 2016, and were filed on the same day. The submissions for the Attorney-General, the Respondent are dated 17th August, 2016, and were filed on the same date. I will consider the respective submissions in turn.

The Applicant's Submissions

7. Counsel for the Applicant urged the court to grant the Application. A creditor should enjoy the fruits of his judgment. The orders for arrest of the Principal Secretary were given back on 15th May, 2015, and no payment has been made, and no action has been taken against the Principal Secretary for National Government, Coordination and Internal Security. The Applicant cannot be expected to know or follow the internal mechanism for payment of the Judgment sum due to him. Having waited for so long, he has come to court to give strength to his claim by asking for the ultimate test of good will and desire to pay, to have the Principal Secretary arrested and brought to court. The Inspector-General of Police must be made to act by order of court.

8. In this regard, counsel for Applicant relied upon the case of **SHIMMERS PLAZA LIMITED vs. NATIONAL BANK OF KENYA LIMITED [2015]eKLR** where the Court of Appeal said –

“The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity and authority of the court must be protected and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy.”

9. And in **REPUBLIC vs. (1) THE KENYA SCHOOL OF LAW (2) THE ATTORNEY-GENERAL AND COUNCIL OF LEGAL EDUCATION [2015]eKLR** G.V. Odunga said –

“Therefore in order to maintain the rule of law and in order that the authority and the dignity of our courts are upheld at all times and to stamp the authority of this court and ensure the values and principles of governance enshrined in Article 10 of the constitution are adhered to, I hereby direct the First Respondent’s Director and the Second Respondent’s Secretary to personally appear before the court to explain why appropriate sanctions ought not to be taken against them in light of their disapproving conduct.”

10. Similarly in **REPUBLIC vs. PERMANENT SECRETARY OFFICE OF THE PRESIDENT MINISTRY OF INTERNAL SECURITY AND CORPORAL ALPHONCE LUMOSI [2014]eKLR** the Judge concluded –

“Accordingly, I direct that the Respondent appears before this court either in person or by a legal representative to show cause a warrant of arrest ought not to issue for his arrest with a view to committing him to civil jail.”

The Respondents’ Submissions

11. In response, State Counsel for the Respondents set out in his submissions (of 17th August, 2016), why a warrant of arrest against the Inspector-General should not be issued. His thesis is that the Inspector-General of Police was not served as contended by the Applicant, and that there was no proof of service in any event. Counsel contended that contempt of court being quasi-criminal in nature, there had to be proof of service upon the subject of the possible arrest. Counsel relied on the British case of **RE BREAMBLEVALE LIMITED [1969] 3 ALL ER 1062** where Lord Denning MR said –

“Contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond all reasonable doubt. It is not proved by showing that, when the man has asked about (his failure to produce certain books belonging to the company as ordered by the Registrar), he told lies. There must be further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence.”

12. On the question of service which is the matter in contention by the Respondent Counsel relied on the case of **RODGERS MUEMA NZIOKA vs. TIOMIN KENYA LIMITED** (Mombasa HCCC No. 97 of 2001) citing the Court of Appeal decision in **MWANGI WANG’ONDU vs. NAIROBI CITY COUNCIL** (Appeal No. 95 of 1998) where the court laid down the standard of proof for contempt of court –

“as a general rule no order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or to abstain from doing the act in question. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if it is disobeyed, he is liable to the process of execution to compel him to obey it. This requirement is important because the court will only punish for breach of injunction if satisfied that the terms of the injunction are clear and unambiguous that the Defendant has proper notice of the terms and that a breach of the injunction has been proved beyond reasonable doubt.”

13. The court went on to say that an order of injunction can be any other order and need not only be an order of injunction.

14. So on the question of service counsel for the Respondents also relied upon the provisions of Order 6 rule 6(2) of the Civil Procedure Rules 2010 which provide that –

“6(1) Documents may either be delivered by hand to the address for service or may be posted to it.

(2) Where delivery is disputed a certificate of posting or other evidence of delivery shall be filed.”

15. Though an independent office, the office of the Inspector-General of Police is part of the national government, and as such process against that office is subject to the provisions of the Government Proceedings Act, [Cap 40, Laws of Kenya], to which the provisions of Order 5, rule 9(1) are subject, and take effect in accordance with Section 13 of the Government Proceedings Act. It provides that service of documents on the Government for purposes of or in connection with civil procedure by or against the Government shall be served on the Attorney-General. Order 5 rule (2) provides that –

“service of a document shall be effected by posting it in a prepaid registered envelope addressed to the Attorney-General or any such agent as aforesaid, and where service under this rule is made by post, the time at which the document so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof.”

16. And Order 5 rule 9(4) defines “document” to include writs, notices, pleadings, orders, summonses, warrants and other documents proceedings and written communication. And Section 13 of the Government Proceedings Act then provides –

“13. All documents required to be served on the Government for the purpose of or in connection with any civil proceedings by or against the Government in accordance with the provisions of this Act shall be served on the Attorney-General.”

17. Upon service by registered post, an applicant is required to file an official receipt to prove he had indeed effected service. The Applicants have not annexed any receipt in their affidavit showing evidence of posting in spite of the concern raised in the Respondent’s Replying Affidavit (of H. Kipkosgei Barmao).

18. Order 5, rule 15(1) of the Civil Procedure Rules 2010 provides –

“15(1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served, identifying the person served and the name and address of the person (if any) served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No. 4 of Appendix A with such variations as circumstances require.”

19. I have examined the various papers filed by the Applicant, and I find no attempt by the Applicant to provide by way of filing any document proving that they served the said warrant. I believe that a person of holding the high office of Inspector-General of Police is as a state officer, bound to accept and act upon court process. He would not ignore it. A Director of Operations in the Kenya Police Service would not state on oath that the Office of the Inspector-General of Police was not served with the warrant of arrest of the Principal Secretary Ministry of National Coordination and Internal Security.

20. The inevitable conclusion is that no service, or proper service of the summons was effected upon the said Inspector-General of Police.

21. The onus is upon the Applicant under Section 107 of the Evidence Act [Cap 80, Laws of Kenya] being the person with peculiar knowledge or information to lay such information before the court. The Applicant has failed to do so.

22. In light of the standard of proof in respect of matters of contempt of court (beyond reasonable doubt – **Re Breamblevale** supra), and beyond the balance of probability, but less than beyond reasonable doubt – Kenya), the Applicant has failed to meet the statutory minima (under Order 5, rule 15(1) and Order 6 rule 6(2) respectively on the affidavit of service, and on a certificate of service where delivery is disputed).

23. In the ultimate the Applicant has failed to advance any ground for the grant of the orders sought in the Notice of Motion dated 6th November, 2015 and filed on 10th November, 2015 which is hereby dismissed with a direction that each party bear its own costs.

24. There shall be orders accordingly.

Dated, Signed and Delivered at Mombasa this 24th day of November, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Munyala holding brief Mr. Asige for Applicant

Mr. Makuto holding brief Mr. Ngari for Respondent

Mr. Kaunda Court Assistant