



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**HIGH COURT CIVIL SUIT NUMBER 40 OF 2014**

**KIROBON FARMERS CO. LTD.....PLAINTIFF/APPLICANT**

**VERSUS**

- 1. BENJAMIN CHESULUT.....1<sup>ST</sup> DEFENDANT/RESPONDENT**
- 2. MR. NGATIA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**
- 3. M/S COLLETA MWAWEU.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. By a Notice of Motion dated 24<sup>th</sup> September, 2014 and filed on the even date, the Applicant Kirobon Farmers Company Limited sought leave of the court to institute contempt proceedings against the Respondent and two others for apparently disobeying a court order issued on the 19<sup>th</sup> June, 2014 which order restrained the Respondents from holding an Intended, Annual General Meeting and election of new Directors of the Company. In disobedience of the said restraining order; the Respondent proceeded with the Annual General Meeting and elected new directors and filed returns in contravention of the court order despite being served with the court orders. The application was brought under the provisions of Section 5 of the Judicature Act, Chapter 8 Laws of Kenya and Sections 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act.

2. The application was supported by an affidavit sworn by one Michael C. Kemei who described himself as the Secretary and Director of the applicant where he deposed on all the events leading to the order issued on the 19<sup>th</sup> June, 2014. Upon application court granted the applicant leave to file and serve the substantive application within 7 days for interpartes' hearing on the 26<sup>th</sup> October, 2014.

3. By an affidavit filed in court on the 25<sup>th</sup> June, 2014, Mr. Ochieng' Gai Advocate for the applicants deposed that he personally served the restraining order upon the Respondent, Benjamin Chesulut by calling him on his mobile phone number and informing him of the court orders stopping the Annual General Meeting scheduled for the 20<sup>th</sup> June, 2014, and by leaving the Court Order with his wife who he claimed was pointed to him by the applicants, names not disclosed.

He further deposed that he served the other respondents by leaving the order with some people gathered for the meeting.

4. The substantive motion was filed on the 3<sup>rd</sup> October, 2014. It was supported by the affidavit of Michael C. Kemei. Upon service, the 1<sup>st</sup> Respondent filed a Notice of Preliminary Objection. The other two respondents did not respond to the application. The Preliminary Objection was argued before this

court on the 11<sup>th</sup> February, 2015 together with the substantive application dated 3<sup>rd</sup> October 2014.

5. I shall first deal with issues raised in the Preliminary Objection by the 1<sup>st</sup> Respondent. It was submitted by counsel that the application for contempt of court against the Respondents was scandalous, frivolous and an abuse of the Court process, bad in law and fatally defective and two grounds were stated. That, the Application was filed out of time and that it was not served upon the Director of Public Prosecutions. Mr. Kipkoech counsel for the 1<sup>st</sup> Respondent proceeded to argue that there was no competent and proper contempt of court application before the court as the said application filed on the 3<sup>rd</sup> October, 2014 was not accompanied by a precise statement of facts which is a core requirement and further, that the application was filed without leave of court as the time granted by the court had expired and no extension of leave to file out of time were sought or granted. It was his strong submission that the order subject of the contempt proceedings was not served personally upon the contempnor, nor was the application served upon the Director of Public Prosecutions. For those reasons, he urged the court to dismiss the application.

6. In response to the Preliminary Objection and arguments by counsel, Mr. Gai Counsel for the applicant submitted that service upon the 1<sup>st</sup> Respondent, though not personal was sufficient and that it was not necessary to serve the Director of Public Prosecutions with the application and urged the Court to ignore the procedural technicalities and allow the application.

Section 5 of the Judicature Act donates the power to punish for contempt of court to the High Court and the Court of Appeal in the following terms:

*“5 (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.*

*5(2) – An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.”*

The above provisions state that the applicable law and procedure is as it obtains in England “**at the time being.**” This court ought to ascertain itself as to the law and procedure to bring up and punish for contempt of court as is presently in England. It is instructive that to date, we do not have our Kenyan home grown law and procedure for contempt of court.

7. In order to determine the soundness and legality or otherwise of the Preliminary objection, I must seek guidance from recent decisions of the Higher Courts within the Kenyan Jurisdiction.

In **Civil Application Number 233 of 2007 (UR 144/2007)**, Court of Appeal Judges, P. Kihara Kariuki, Maraga, and Ouko, J.J.A, in their decision dated the 4<sup>th</sup> February, 2014 held that the procedure applicable in our local jurisdiction is governed by the provisions of Order 53 Rule 4 of the Rules of the Supreme Court of England which states:

*“Rule 4(2) subject to Paragraph (3) the Notice of Motion, stating the grounds of the application and accompanied by copy of the affidavit in support of the application must be served personally on other person sought to be committed.*

*(3) without prejudice to its powers under Order 65, Rule 4, the Court may dispense with service of Notice of Motion under this rule if it thinks it just to do so.*

8. The High Court thus draws its Jurisdiction to punish for contempt of court orders from the Common Law of England and statute, the Judicature Acts and the procedure is briefly that:

1. An application to the High Court of England for committal will not be granted unless leave to

make the application is granted.

2. That the application must be made *ex parte* to a Judge in Chambers and be supported by a statement setting out the particulars of the application and grounds on which the committal is sought, and by an affidavit verifying the facts relied on.

3. That the applicant must give notice of the application for leave not later than the proceeding day to the crown office.

4. Where leave is granted the substantive application by motion must be filed within 14 days after the granting of leave, if not, leave shall lapse.

5. That the motion with the statement and affidavit must be served personally on the person sought to be committed, unless the court thinks otherwise.

9. The above rules of procedure have been applied in Kenya in many court decisions. So then, in the present application, it is clear that the applicant did not adhere to the procedure above enumerated. To start with, the substantive motion dated the 3<sup>rd</sup> October, 2014, and also the motion filed on the 24<sup>th</sup> September, 2014 seeking leave to file the contempt proceedings was not accompanied by a statement. The applicant did not say a thing on that omission in its submissions. It was not served upon the Director of Public Prosecutions. It was also filed out of the time leave having been granted on the 24<sup>th</sup> September, 2014 and motion filed on the 9<sup>th</sup> October, 2014. The applicant admits that indeed the 1<sup>st</sup> respondent was not served personally with the order giving rise to the contempt proceedings against him.

10. I have looked at other Kenyan Court decisions and it is clear that unless the above procedural and legal requirements are adhered to, the applicant can not succeed in the application.

11. A Preliminary Objection must consist of points of law which arise from the pleadings, and must raise only matters of law and ought to be argued on the assumption that all facts pleaded by the respondent are correct. It must not be blurred with factual details to be proved by evidence. Where evidence or interrogation of a fact must be done, then a Preliminary Objection cannot succeed.

12. I have carefully considered the application under review and submissions by counsel. It is not in doubt that the application does not meet the procedural and legal threshold for contempt of court proceedings. The applicant did not attach a statement of facts, did not serve the respondent in person, did not give notice to the Director of Prosecutions and the motion was filed out of time. As concluded by Justice G.V. Odunga, J on the 6<sup>th</sup> November, 2012 in his decision in **John Mugo Gachuki -vs- New Nyamakima Company Limited Nairobi Civil Case Number 456 of 2011**, the application for leave to bring the Contempt of Court proceedings against the 1<sup>st</sup> Respondent as well as the substantive application dated 3<sup>rd</sup> October, 2014 are incompetent and are thereby struck out.

There shall be no orders as to costs.

**Dated signed and delivered at Nakuru this 28<sup>th</sup> day of May 2015**

**JANET MULWA**

**JUDGE**

**In the presence of:**

Gai - for the Applicant

No appearance - for the Respondent

Lina - Court clerk