REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 335 OF 2015

AMOS MATHENGE KABUTHU.....APPELLANT

VERSUS

SIMON PETER MWANGI.....RESPONDENT

RULING

1. This ruling determines a notice of motion dated 2nd September, 2015 wherein the Respondent seeks to have the Appellant punished for contempt of court. The orders stated to have been defied are those of Onyancha J. Made on 11th August, 2015 exparte in the first instance. The Respondent contends that despite the order, the Appellant defiantly alleged contemnor went ahead and conducted a wedding on 15th August, 2015. The Appellant filed replying affidavits denying that he was served with the order and neither did he know of its existence at the time he was officiating the wedding on 15th August, 2015. It was also contended that the order was only received by the Appellant on 17th August, 2015 and that his counsel was in Mombasa attending an annual Law Society of Kenya Conference hence he could not have been personally served with the order on 12th August 2015 as alleged by the process server. The appellant's counsel deposes that it was upon his return to the office on 17th August, 2015 that he saw the order received by his office in his absence that he advised his client the appellant to comply.
2. Mr. Kirimi learned counsel for the Respondent urged the court to find the Appellant contemptuous of the orders granted by this court on 11th August, 2015 for presiding over a wedding on 15th August, 2015 at AIPCA Church Rongai. He contended that the order issued by Onyancha J set aside orders of 31st July, 2015 which orders had suspended the suspension of the Appellant as ordered by Hon. Chesang C.M. on 16th July, 2015 when she found him in contempt of court orders and suspended him for 6 months. That Judge Mabeya temporarily lifted that suspension. That the said order of Hon Mabeya J was not served upon the respondent and this culminated in the orders of 11th August, 2015 by Onyancha J, which orders were to be extracted and served upon the appellant within three (3) days together with the application. He stated that the order was served on 12th August, 2015 on the advocate for the Appellant and the Appellant too was served. That despite the service of the order, the Appellant proceeded on 15th August, 2015 to conduct a wedding and to brag that he could not be cowed by orders of any court. Mr Kirimi argued that there was no denial by the Appellant that he celebrated that occasion, which was a second action of disobedience of court orders. That the Appellant had been convicted in the same stream of matter. That the Appellant has no regard for the rule of law and deserves to be punished. Counsel for the applicant submitted that it is not the first time the Appellant is being charged with contempt of court. That in HCCC No. 127 of 2015, he was convicted and he wrote an apology and the matter is pending sentence. He cited the case of **Africa Management Communication International v. Joseph Mathenge Mugo & another (2013) eKLR**, where the court considered

what constitutes contempt. He stated that the Appellant has vowed not to obey court orders or observe suspension by the lower court, urging the court to order him to purge the contempt before being heard.

3. Mr. Kuria learned counsel for the Appellant on the other hand argued that the accusations facing the Appellant are quasi-criminal in nature and there must be proof of service of the order. He contested that there was no service of the order until 17th September, 2015. That it is the OCS of Jogoo Road Police Station who notified the Appellant of the order and upon learning of the order he immediately complied. That Solomon Chege Kamau, who is said to have been served on 12th September, 2015 was on leave and could not have received the order. Mr Kuria also contended that he too was in Mombasa and was not served with the order. He stated that the order was received on 17th August, 2015 and as at that time contempt proceedings had not been filed.
4. In response thereto Mr. Kirimi submitted that the affidavit of service was not challenged and that there was no application to cross examine the process server, and that the church stamp is affixed on the order.

Determination

5. I have carefully considered the application seeking to have the appellant Amos Mathenge Kabuthu committed to jail for disobeying a lawful court order, the able rival submission by both counsels for the respective parties to this application and the relevant authorities cited before me. I have also considered the applicable law as it is in the Kenyan statutes and the imported Law namely, the Supreme Court of England Rules by dint of Section 5 of the Judicature Act.
6. Section 5 of the Judicature Act, which is the substantive law on contempt of court in Kenya provides that:
    a. ***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.***
    b. ***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."***
7. The applicable procedural law governing contempt of court is Section 63 of the Civil Procedure Act which provides:-

"63. In order to prevent the ends of justice from being defeated the court may, if it is so prescribed –

a. **…**
b. **…**
c. ***Grant a temporary injunction and incase 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 Rules, 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.

8. Thus, this court has powers to cite and commit a person for contempt of court if such a person brazenly disobeys its lawful orders. Contempt of court is meant to protect the integrity of the court process and respect for the rule of law. It has nothing to do with respect for orders of an individual judge. The general rule governing the obligation of persons to obey court orders was enunciated in the case of **Hadkinson v. Hadkinson [1952] ALL ER 567**, in which Romer LJ stated at page 569 as follows:-

"It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made against by a court of competent jurisdiction to obey it unless and until

<u>that order is discharged</u>. 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 even void." (emphasis added).

9. Further, Lord Donaldson MR said in **<u>Johnson –v- Walton (1990) 1 FLR350 at 352</u>** stated that:-

> ***"It cannot be too clearly stated that, <u>when an injunctive order is made or when an undertaking is given, it operates until it is revoked on appeal or by the court itself, and it has to be obeyed whether or not it should have been granted in the first place.</u>" (Emphasis added).***

10. The orders alleged to have been defied were issued exparte on 11th August, 2015 by Hon. Onyancha J while the act of conducting or presiding over a wedding in alleged disobedience of the order of 11th August, 2015 is alleged to have been done on 15th August, 2015. The alleged act of officiating a church wedding has not been disputed by the Appellant. Rather, he has disputed receipt of and or knowledge of the said court order before officiating the said church wedding on 15th August, 2015.
11. The burden of proof lies with the applicant and the standard of proof in contempt proceedings is much higher than proof on a balance of probabilities. It is almost but not exactly beyond reasonable doubt. This is because the charge of contempt of court is akin to a criminal offence and a party is likely to lose his liberty. This position is fortified by the Court of Appeal holding in the case of **<u>Mutitika v. Baharini Farm Ltd [1985] KLR 227</u>** where it was held that the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge. See **<u>Re Breamblevale [1969] 3 All R 1062, 1064.</u>**
12. Before finding whether or not there was contempt of court order, this court has to be satisfied that:
    a. There was a court order issued by this court;
    b. The order was proper;
    c. There was service of the said order upon the alleged contemnor or that the alleged contemnor had knowledge actual or constructive of the order and what it commanded him to do or to refrain from doing
    d. The order was clear and unambiguous
    e. There was breach of the said order.
13. There is no dispute that on 11th August 20156 this court issued an order which is on the court file and also annexed to the application for contempt.
14. As whether or not the impugned order was a proper court order, the order was obtained ex parte hence the court's directive that service be effected upon the Appellant within three days from date of issue. Further, the said order bore the title of the case which includes the case number and the names of the parties herein. It was also properly sealed and signed by the deputy Registrar, though it never had a penal notice which omission was in any event, not fatal. It is therefore a proper court order.
15. On the issue of service, on the left hand bottom of the order of 11th August, 2015 annexed to the applicant/Respondent's application is a receiving stamp which reveals that the order was received by the African Independent Pentecostal Church of Africa on 12th August, 2015. That is before the date of the wedding said to have been presided over by the Appellant. Could that service be considered as service on the Appellant? The process server states that he met the appellant who directed the process server to give the order to Mr Solomon to stamp and that the appellant also instructed him to serve his lawyers. The Appellant is a leader in the said church, which has had continuous leadership wrangles for quite some time now. I do not think that such service even if it was not effected on the appellant personally could have escaped his attention considering the said circumstances. There has been controversies surrounding the leadership of the of the AIPCA church and particularly the Appellant and therefore it is expected that whoever received a court order within the church and stamped on it had the authority to do so. The appellant has not denied that the stamp appended on the return copy belonged to the church where he ordinarily carries out his pastoral duties. It is therefore highly doubtful that whoever received the order on 12th August 2015 on behalf of the alleged contemnor could have slept on the order. In my view, the Appellant

must have had knowledge of the order. See:- **Bhatnager v. Canada (Minister of Employment and Immigration) [1990] 2 S.C.R 217 at p. 226** put the principles as follows:-

> ***"…a finding of knowledge on the part of the client may in some circumstances be inferred from the fact that the solicitor was informed. Indeed, in the ordinary case in which a party is involved in isolated pieces of litigation, the inference may readily be drawn … On other cases there can be no doubt that the common law has always required personal service or actual personal knowledge of a court order as a precondition to liability in contempt… knowledge is in most cases (including criminal cases) proved circumstantially, and in contempt cases, inference of knowledge will always be available where facts capable of supporting the inference are proved."***

And in Christine Wangari Gachege v. Elizabeth Wanjiru Evans & 11 Others (Civil Application No. 233 of 2007) it was held that

"The dispensation of service under Rule 81.8 (1) is subject to whether the person can be said to have had notice of the terms of the judgment or order. The notice of the order is satisfied if the person or his agent can be said to either have been present when the judgment or order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, 'otherwise' would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgment and/or order. This would definitely include a situation where a person is represented in court by counsel. Once the applicant has proved notice, the respondent bears an evidential burden in relation to wilfulness and mala fide disobedience."

and further in ***Justus Kariuki Mate & Another v. Martin Nyaga Wambora & Another [2014] eKLR*** the Court of Appeal held that the applicant in an application for contempt must prove that personal service was effected on the respondent or in the alternative that the respondent had knowledge of the order. The court further observed that a person will be held to have notice of a fact or condition if that person:-

i. Has actual knowledge of it;

ii. Has received information about it;

iii. Has reason to know about it;

iv. Knows about a related fact.

The court also observed that the law of contempt of court has since changed and it stands today, knowledge of an order is sufficient for purposes of contempt proceedings.

16. In the instant case, the process server does not state in his affidavit that he knew the appellant personally whether at the time of service or that he knew him prior to that date of service of the order. Secondly, there is an affidavit by Mr. Solomon deposing that he was on leave at the material time of the alleged service. Albeit the applicant counters that affidavit with his own affidavit to the effect that he met the said Mr Solomon who owned up that he never swore such an affidavit and that he never went on leave at the material time, the burden of proving that the deponent therefore must have sworn a false affidavit lay on the applicant to demonstrate to the court. He did not and as such the court had no means of deciphering whether or not that affidavit of Solomon was either not sworn by Solomon or was a lie. The appellant failed to satisfy the court on the grounds upon which he could be allowed to cross examine the deponent of the affidavit and so the court disallowed an application to cross examine the said Solomon.
17. As to whether the appellant's counsel knew of the order and therefore ought to have notified his client to obey, this court has been shown a letter from LSK showing that the advocate Mr Kuria was in Mombasa attending the LSK Annual Conference. Nonetheless, there is no dispute that his

office was served with the order which was filed away awaiting his return for action.

18. **Lenaola J** in the case of **Basil Criticos Vs Attorney General and 8 Others [2012] eKLR** stated that :-

"...the law has changed and as it stands today knowledge supersedes personal service.....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."

19. In the end I conclude that the appellant was aware of the court order in question, the same having been served on 12th August, 2015 and received in his church.

20. As to whether the order was clear and unambiguous, I have carefully examined the order in question issued on 11th August 2015 as extracted and brought to the knowledge of the appellant alleged contemnor herein Amos Mathenge Kabuthu and observe that order no. 4 thereof reads:

> ***"THAT the orders of 31st July, 2015 are hereby set aside to allow the appointment of Acting Archbishop, The Chairman, of the Synod appointed on 20th July 2015 to continue acting as per decision and resolution of the Synod of 20th July 2015 until the applications are heard and determined..."***

21. First is that the order is not specifically addressed to a particular person. Second is that for one to understand what the above orders of 11th August 2015, were all about one must have had at hand the orders of 31st July, 2015 which were being set aside, peruse and understand what the latter order stated. The order of 31st July 2015 states:

> ***"1.....***
>
> ***2. that there be status quo until 16th September, 2015***
>
> ***3. THAT an interim stay of execution of the orders granted on 9th July 2015 as amended on 16th July 2015 in respect to the application dated 15th April, 2015 in Milimani CMCC No. 1647 of 2015(Simon Peter Mwangi-vs- Amos Mathenge Kabuthu)be and is hereby granted pending the hearing of this application inter-partes***
>
> ***4....."***

22. Again, to obey the above orders of 31st July, 2015, it required one to examine the orders of 9th July, 2015 as amended on 16th July, 2015 which order provides:

> ***" 1. THAT the respondent be and is hereby suspended and restrained from presiding over, organizing, conducting, attending and participating in activities of AIPCA Bahati Cathedral as well as any other church related, affiliated and or operating under AIPCA Church in the Republic of Kenya for a period of six months from 9th July, 2015.***
>
> ***2.....***
>
> ***3.....***
>
> ***4.....***
>
> ***Hon. M.Chesang(MRS)***
>
> ***RESIDENT MAGISTRATE."***

23. It is the orders of 16th July, 2015 above that provoked this appeal. As such, it therefore follows that there were a chain of orders which had to be read together with the order of 11th August, 2015 in order for one to understand that in fact, what was to be obeyed was in essence, the orders of Chesang Mrs made on 16th July, 2015 in the subordinate court. That being the case, clearly, then the order of 11th August 2015 was not clear and unambiguous. Ambiguity consists in an order having unclear meaning or lending itself capable of different interpretations. The law of contempt as earlier stated requires that for one to be cited and punished for contempt of court there must be proof that is much more than on a balance of probabilities, close to beyond reasonable doubt but not exactly beyond reasonable doubt. Not only is the court supposed to be satisfied that there was an order which was disobeyed but that the order was clear and unambiguous and incapable of different interpretations.
24. The appellant in this matter may have had so many cases in court as demonstrated, some of which he was cited and punished for contempt. But he is an ordinary litigant. An order served upon him requiring obedience must be clear on the face thereof to leave no doubt in the mind of the court that if he disobeyed it then that disobedience must have been deliberate.
25. In my view, presiding over the wedding on 15th August 2015 could only have amounted to contempt of court order issued on 16th July 2015 and not the order of 11th August 2015, yet it is not the order of 16th July 2015 that is impugned before this court. Nothing prevented the applicant from specifically seeking those orders of 16th July 2015 by replicating what was sought to be stayed. Failure to do so in my view makes the order as issued and extracted unclear and owing to the standard of proof required to prove contempt of court order, I would in this case entertain doubt that even if the order was served upon the appellant, it was not clear as to what was to be done or refrained from being done. That cloud of doubt would go to the benefit of the appellant alleged contemnor. Further clouds in the said order emerge from the fact that the order was not directed at the appellant commanding him to do or refrain from doing anything. As I have stated, for one to obey the impugned order one had to read and understand the order of 31st July 2015 which was also not clear and to understand that latter order one had to look for the order made by the lower court made on 9th July 2015 as amended on 16th July 2015 to know who was being addressed and what the subject matter of the order was all about. The two orders of 31st July, 2015 and 16th July, 2015 were not annexed to the affidavit in support of the application for contempt proceedings and neither were they served simultaneous with the impugned orders. This court had therefore to go on a fishing spree to find out what those other orders were, and link them to the order of 11th August 2015.
26. All those lacunae would go to the benefit of the alleged contemnor as the evidence of contempt is not watertight to sustain a finding of guilt.
27. Accordingly, whereas I find that the appellant was aware of the order, I find that the applicant has not laid before this court watertight evidence to the required standard to prove contempt of court and I accordingly find that there was no contempt of court proved against the alleged contemnor and I dismiss the application and acquit Amos Mathenge Kabuthu of the contempt of court charge.
28. I make no orders as to costs.

Dated signed and delivered at Nairobi this 23rd day of November, 2015.

R.E.ABURILI

JUDGE