



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC CRIMINAL APPLICATION NO. 102 OF 2015

UMMULKHEIR SADRI ABDULLAH

MARYAM SID ABOUND.....APPLICANTS

KHADIJA ABDULKADIR ABUBAKAR

VERSUS

THE OFFICER IN CHARGE

SHIMO LA TEWA PRISON.....RESPONDENT

R U L I N G

1. By an application Notice dated 13th November 2015 and filed on 16th November , 2015 the applicants sought to have:
 1. The matter certified as urgent and be heard exparte in the first instance.
 2. The court order the respondent to release the applicants from it custody forthwith pending the hearing and determination of the application interparties.
 3. The Respondent summoned before the honourable court to show cause why he should not be committed to civil jail for blatantly refusing, rejecting and/or failing to comply with the orders issued by the Honourable court on the 13th November 2015.
2. The application is premised on the grounds on the face of the application and the supporting affidavit of HAMISI ALI MWADZOGO dated 13th November,2015 together with the annexures marked "UMLI" and "UML2",that:
 - i. On 13th November 2015, a release order was issued by a court of competent jurisdiction directing the officer in charge, Shimo La Tewa prison to release the applicants.
 - ii. Despite service of the said order the respondent has refused to obey the same;
 - iii. Unless the application is allowed and the respondent punished there is a possibility that people will not take court orders seriously.
- a. The respondent on the other hand, filed a replying affidavit whereby he deponed (a) that on 13th November 2015, at around 5.00pm Inspector Rachael Gathia informed him that a release order had been presented to her at the Women's prison by relatives of the applicants.
- b. that as the authorized officer, she required him to clear the release as required under second 45 (1) of the prison Act.
- c. He inquired from her what the terms of release were and she indicated that she had not been

- served with the full record indicated the terms but only a release order.
- d. Given the nature of the charge that the applicants face, he directed the officer to liaise with the officer deployed in court to verify the following.
 - (i). whether the release order was genuine.
 - (ii) what were the terms of release.
 - e. At the time his officers went to verify the above, the court registry was already closed, they could not access the court file.
 - f. The only option left to them was to wait until the next court day that was Monday 16th November, 2015.
 - g. The applicants relatives were advised to return with the order on Monday, the 16th November 2015 morning, so they could act upon confirmation.
 - h. The relatives did not return to the prison as advised.
 - i. In the afternoon of 16th November 2015 the officer in charge of Shimo La Tewa prison learnt from the office of the Director of Public Prosecution that an application had been filed for contempt proceedings against his office.
 - j. He was further informed by counsel that the Directorate of criminal investigations who had also learnt of the release orders, had requested for a review of the orders and that the necessary application had been prepared and filed.
 - k. Faced with this situation the officer in charge of Shimo La Tewa prison was left in limbo since the relatives had not returned with the release order and therefore he had nothing to act on.
 - l. He wished to clearly state that the release order was not personally served upon him but the court liaison officer as per the stamp on the face of the release order;
 - m. He had no intentions whatsoever of not complying with the orders of the court and had the applicants relatives followed the advice given to them by my officer and returned to the prison on Monday, he would have promptly complied;
 - n. He has not also been served with the application for contempt and had the office of the Director of Public Prosecution not informed him he would still be in the dark about these proceedings.
 - o. He was reliably informed by one Albert Ngala an officer at the office of the Director of Public Prosecution that the contempt application was served upon their office at about 3,30 pm.

5 On 16.11.2015, the applicants filed the application herein which the court certified as urgent, directed that the DPP be served with and fixed the same for mention 17.11.2015. There was, however, an oversight on the part of the court whereby there were no directions issued with regard to the respondent, the officer in charge of Shimo La Tewa. All the same, he was notified of the contempt proceedings which had been initiated against him by the applicant by the office of the Director of Public Prosecution and apart from filing a response by way of replying affidavit he also attended court on the 17th the day of November 2015.

6 On 17.11.2015 the application dated 13th November 2015 proceeded for hearing and counsel for both parties argued their submissions orally.

7 Mr Mwadzogo learned counsel for the applicants submitted in line with what he had deponed in the supporting affidavit dated 13th November ,2015. He then went on to respond to the averments in the replying affidavit sworn by the Assistant Commissioner of Prisons, Samuel Karanja Nyutu on 17.11.2015.

In response to paragraph 2 of the replying affidavit, Mr. Mwadzogo, learned counsel for the appellant submitted that it was him, the advocate, who took the release orders to Shimo L Tewa prison and not the relatives of the applicants as deponed. He also responded to paragraph 5 of the said affidavit that the release orders never reached the prison at 5.00pm. Further, he stated that the release orders were stamped by the Shimo La Tewa main prison court officer, hence there was no need of verifying the same as alleged by the deponent. He informed court that he had the original

release orders which he wished to leave in court for it to note that there had been cancellation on them; meaning the applicants were released and the release orders cancelled. He summed it by urging the court to punish the respondent in a bid to protect the dignity of the court and the rule of law.

8 Mr Muteti, learned counsel for the state, before responding to Mr Mwadzogo's submissions, requested that the deponent of the supporting affidavit to the application, who is the applicant's counsel be cross examined as he had made reference to matters which he had not deponed to. The court allowed Mr. Muteti's request and cross examination of the applicant counsel. Basically from cross examination of the applicant counsel it was confirmed that the affidavit date 17.11.2015 was drawn and filed by him. It also came out that the application before court was fatally defective incompetent and bad in law because the affidavit in support of it is indicated as dated 17.11.2015 while the application was filed on 16.11.2015. Mr Muteti also submitted that counsel for the applicant ought not to have sworn the affidavit in support of the application as he was placing himself in the position of a witness. Further, he submitted that no service was effected upon the officer in charge of Shomo La Tewa, main prison. He also submitted that it was the relatives of the applicants who took the release orders to the prisons and that is why the release order was served upon the In charge, women prison in Shimo La Tewa instead of the in charge Shimo La Tewa prison, whom it had been addressed to. He then informed court that their response for failure to comply with the release order is clearly set out in the replying affidavit of SCP Samuel Karanja Nyotu. He was assisted in arguing his submissions by his learned friend, Mr Kiprop. They cited a number of authorities for the court to consider in determining this application.

9 In considering the application, the grounds on the face of it, grounds in the supporting affidavit, grounds in the replying affidavit, and submissions by counsel, I came up with the following issues for determination.

1. Was there a court order?
2. Was the said officer in charge Shimo La Tewa G L prison?
3. Was the said officer, then in contempt of the court?

10 Having listened to all learned counsel, a number of issues with regard to the law and technicalities were raised. However, having given deep thought to the nature of the application, circumstances surrounding the same and the consequences that would arise from any decision I would make, I will not wish to pursue these arguments by all counsel with regards to the application for contempt proceedings against the respondent as this will elongate the trial that is pending before the lower court.

11 It is not in dispute that there exist a court order from a court of competent jurisdiction in the form of release orders.

12 It is also not in issue that the said court order was within the knowledge of the respondent irrespective of when they were served upon him.

13 It is also not in dispute that even at the time this application was being argued the respondent had not complied with the said court order despite the fact that the service had not been vacated or stayed, meaning the disobedience was persisting.

14 In the case of **JUSTUS KARIUKI MATE & ANOTHER VS MARTIN NYAGA WAMBORA AND ANOTHER (2014)** e KLR, the court of appeal sitting in Nyeri held that:

“ the duty to obey the law by all individuals and institutions is cardinal in the maintenance of the law and the due administration of justice. In Hadkinson vrs Hadkinson (1952) all ER 567, Romer, LJ stated:”

“ it is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. 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 Lord Cottenham L.C , said in *Chuck vrs Cremer (1) (I Coopiteny Cutt 342)*:

“ a party , who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it.it would be most dangerous to hold that the suitors, or their solicitors, could themselves judge. Whether an order was null or valid whether it was regular or irregular. That they should come to court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to court that it might be discharged. As long as it exists, it must not be disobeyed.”

An in the case of “Refrigeration and Kitchen utensils Ltd vrs Gulab Popatlal Shah and another, Civil application No 39 of 1990 it was held:

“ ...It is essential for the maintenance of the rule of Law and good order that the authority and dignity of our courts is upheld at all times”.

15 I reiterate what has been held in many other decisions in our courts that courts of law have to be respected, and their orders obeyed. Parties against who orders are made cannot be allowed to hold court at ransom or treat them with impunity, no matter the circumstances. Courts cannot be taken on a merry –go –round spree by parties.

16 As held by Justice Odunga in *Re Edward Mutinda Ndeti and 15 others (2015) eKLR*

“.....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 respondent to personally appear before his court to explain why appropriate sanctions ought not to be taken.”

In the instant case, in light of foregoing circumstances, I find the application merited and order the respondent to release the applicant from his custody forthwith, failure to which he will be held liable for contempt of court and orders made accordingly.

17 This order to be served upon the respondent for compliance.

Ruling delivered, dated and signed this 9th day of December 2015.

D. O. CHEPKWONY

JUDGE

In the presence of

M/s Warupe for the state

Mr Mwadzoga for applicant

Mr Chacha for the applicant

C/Assistant - Kiarie