



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JR CASE NO. 185 OF 2009**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PRINCIPAL MAGISTRATE'S COURT**

**(CITY COURT).....1<sup>ST</sup> RESPONDENT**

**CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> RESPONDENT**

**VIKTAR MAINA NGUNJIRI.....3<sup>RD</sup> RESPONDENT**

**EX-PARTE**

**JACK & JILL SUPERMARKET LIMITED**

**RULING**

On 27<sup>th</sup> March, 2009 Nyamu, J (as he then was) granted leave to the ex-parte Applicant (Jack & Jill Supermarket Limited) to commence judicial review proceedings and seek judicial review orders of certiorari & prohibition against the Principal Magistrate's Court at City Court, the City Council of Nairobi and Viktar Maina Ngunjiri being the 1<sup>st</sup> to 3<sup>rd</sup> respondents respectively. The learned Judge also directed:

**“THAT the leave granted to apply for the above orders of certiorari and prohibition do operate as a stay of any further implementation by the respondents or any other person in whatsoever form, the requirements of Notices No. 5445 and 5446 and the subsequent order made on the 6<sup>th</sup> day of February, 2009 in Cr. Case No. 520A of 2008 by the Hon. L. Nyambura Ag. Principal Magistrate and in particular the eviction, demolition and or interference with the applicants/tenants occupation of the entire premises comprised on L.R. No 209/869 Race Course Road Nairobi.”**

The 3<sup>rd</sup> Respondent did not obey the said order and the ex-parte Applicant commenced contempt of Court proceedings. Through a ruling delivered on 16<sup>th</sup> February, 2011 D. Musinga, J (as he then was) concluded that the 3<sup>rd</sup> Respondent had disobeyed the court order. He fined him Kshs.200,000/= in

default to serve four months imprisonment. The 3<sup>rd</sup> Respondent informed this Court that he appealed against the decision but the appeal is yet to be determined.

It appears that even with this punishment the 3<sup>rd</sup> Respondent did not obey the Court order and on 29<sup>th</sup> August, 2012 the ex-parte Applicant filed a notice of motion application dated 28<sup>th</sup> August, 2012 under Section 5 of the Judicature Act, Cap 8 Laws of Kenya and Order 52 of the Rules of the Supreme Court and the main order it seeks is:

**“THAT this Honourable Court be pleased to cite for contempt Mr. Viktar Maina Ngunjiri for his disobedience of the order of this Honourable Court made on the 27<sup>th</sup> day of March, 2009 and duly served on him, and he be committed to jail for a term not exceeding six months for the said disobedience of the court order.”**

The application is supported by the grounds on its face to wit:

1. **THAT a valid Court Order was made by this Honourable Court on the 27<sup>th</sup> day of March, 2009 and in particular restraining the respondent from evicting, demolishing and or interfering with the applicant/tenant’s occupation of the entire premises comprised on L.R. No. 209/869 – Race Course Road/Temple Road.**
2. **THAT the Court Order herein together with the penal notice was personally served on the 3<sup>rd</sup> respondent and an affidavit of service duly filed in this Honourable Court on the 5<sup>th</sup> day of May, 2009.**
3. **THAT the Order of the Court made on the 27<sup>th</sup> day of March, 2009 has never been varied, set aside and or modified in any way since the 3<sup>rd</sup> respondent was found to be in contempt of the same Court Order on the 16<sup>th</sup> February, 2011 and fined a sum of kshs.200,000/= in default to serve 4 months in jail and which sum was duly paid.**
4. **THAT the 3<sup>rd</sup> respondent/interested party has flagrantly disobeyed the aforesaid Court Order demolishing a substantial portion of the premises and interfering with ex-parte applicant’s quiet use of the same contrary to the terms of the Court Order.**
5. **THAT despite complaint, the 3<sup>rd</sup> respondent/interested party has made no effort whatsoever to purge the contempt of Court and only severe action will surely teach him a lesson.**
6. **THAT the authority and dignity of this Honourable Court is being put to severe test by the conduct of the 3<sup>rd</sup> respondent/interested party herein.**
7. **THAT it is in the interest of justice, fairness and good governance that Court Orders be respected, and in the event of blatant violation, severe action be taken as against the contemnors.**
8. **THAT the 3<sup>rd</sup> respondent/interested party is a perpetual violator of Court Orders and only a custodial sentence will serve as a lesson to him having been fined in the past for violating the same Court Order.**

The application is also supported by the affidavit of Tom Onyancha who is the Managing Director of the ex-parte Applicant. The application is further supported by the chamber summons application for leave to commence the contempt proceedings, a statement of facts and the verifying affidavit of Tom Onyancha all filed on 8<sup>th</sup> August, 2012.

In summary the Applicant’s case is that on 6<sup>th</sup> August, 2012, in utter disregard of this court’s order, the 3<sup>rd</sup> Respondent in company of other persons invaded the suit premises and commenced demolition of the same.

The 3<sup>rd</sup> Respondent opposed this particular application through a replying affidavit sworn on 11<sup>th</sup> September, 2012 and notices of Preliminary Objection filed on 28<sup>th</sup> August, 2012 and 3<sup>rd</sup> September, 2012 respectively. The 3<sup>rd</sup> Respondent denied demolishing the suit premises in disobedience of the Court order. The 3<sup>rd</sup> Respondent contends that the contempt proceedings are irregular in that the same are

geared towards having him punished for an offence that he has been previously punished by the Court and this goes against the maxim that **“no man shall more than once be placed in the peril of legal penalties against the same accusations.”** The 3<sup>rd</sup> Respondent also argued that the committal proceedings are fatally defective for want of compliance with mandatory provisions of Order 52 of the Rules of the Supreme Court.

Even as the application filed on 29<sup>th</sup> August, 2012 was pending hearing, the ex-parte Applicant on 15<sup>th</sup> July, 2013 filed a notice of motion application dated the same date and expressed to be brought under Section 5 of the Judicature Act, Cap 8 of the Laws of Kenya; Order 51 of the Civil Procedure Rules, 2010; Sections 1A, 1B, 3A and 63(c) and (e) of the Civil Procedure Act; and Order 52 Rules 2(i) of the Rules of the Supreme Court of England. The main prayer in this application is to the effect:

**“THAT this Honourable Court be pleased to cite for contempt Mr. Viktar Maina Ngunjiri for their (sic) disobedience of the Orders of this Honourable Court made on the 27<sup>th</sup> day of March, 2009 and duly served on him and he be committed to civil jail for a term not exceeding six months for the said disobedience of the Court Order.”**

This particular application is based on, among other grounds, the ground **“that on 23<sup>rd</sup> day of May, 2013 and the days thereafter, and in total disregard of the existence and command of the Court Order herein and with the use of hired goons the 3<sup>rd</sup> Respondent/Interested Party evicted the Ex-parte Applicant and completely demolished the premises comprised in L.R. No. 209/869 Race Course Road/Temple Road.”**

The application is supported by the affidavit of Schon Noorani, the Chairman of the Ex-parte Applicant, sworn on 15<sup>th</sup> July, 2013; and the chamber summons application for leave, the verifying affidavit of Schon Noorani and the statement of facts all dated 28<sup>th</sup> June, 2013.

The 3<sup>rd</sup> Respondent opposed the application through a replying affidavit he swore on 9<sup>th</sup> September, 2013. It is his case that this application is an abuse of the court process since it is similar to the applications dated 28<sup>th</sup> August, 2012 and the one heard and determined by Justice D. Musinga (as he then was). In line with this argument the 3<sup>rd</sup> Respondent contends that the application offends the principle of double jeopardy. The 3<sup>rd</sup> Respondent also argues that no proper and/or lawful leave was sought and obtained, prior to the filing of the application, as required by the law.

The 3<sup>rd</sup> Respondent says there are no proper applications before the Court. In respect of the application dated 28<sup>th</sup> August, 2012 and which I will henceforth refer to as the first application, he contends that the order granting leave to the Applicant which was made ex-parte on 8<sup>th</sup> August, 2012 was made contrary to the provisions of Order 52 Rule 2(2) of the Rules of the Supreme Court (RSC) of England which requires that the affidavit verifying the facts to be relied on should be filed before the application for leave is made. Secondly, the 3<sup>rd</sup> Respondent contends that the Applicant violated Order 52 Rule 2(3) RSC by failing to give notice to the Attorney General at least a day before the filing of the application and also failing to lodge with the Attorney General the copies of the statement and verifying affidavit. The Applicant therefore submits that no proper leave was granted by the Court and the notice of motion application dated 28<sup>th</sup> August, 2012 is incompetent.

The 3<sup>rd</sup> Respondent further argues that the application is fatally incompetent for the reasons that the application was filed on 29<sup>th</sup> August, 2012 while leave was granted on 8<sup>th</sup> August, 2012 meaning that the application was filed outside the 14 days required by Rule 3(2) of Order 52 of the RSC. Further, the 3<sup>rd</sup> Respondent argues that there was no personal service of the notice of motion, statutory statement and the verifying affidavit as required by Order 52 Rule 3(3) of the RSC.

As to the application dated 15<sup>th</sup> July, 2013 and which I will hereinafter refer to as the second application, the 3<sup>rd</sup> Respondent contends that no proper and/or lawful leave was sought or obtained prior to filing of

the application.

The power to punish for contempt is found in Section 5 of the Judicature Act, Chapter 8 Laws of Kenya. Through the provision the High Court and the Court of Appeal are given **“the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England ...”** This means that this Court has to scan the law applicable in respect of committal for contempt of court in England, at the time an application is filed, and apply that law in Kenya.

In **REPUBLIC v COUNTY COUNCIL OF NAKURU EX-PARTE EDWARD ALERA T/A GENESIS RELIABLE EQUIPMENT & 2 OTHERS [2011] eKLR** W. Ouko, J (as he then was) summarized the procedure for instituting contempt of court proceedings as follows:

**“The procedure as it is today after permission has been granted may be summarized as follows:**

**i) Unless within 14 days after permission was granted the claim form (the substantive application) is made, the permission shall lapse (Order 52 Rule 3 (2).**

**ii) The substantive application, accompanied by a copy of the statement and affidavit in support of the application for permission must be served personally on the contemnor. (Rule 3 (3), unless the Court or Judge has dispensed with service or if it or he thinks it just to do so (Rule 3 (4)**

**iii) Under Rule 5 the High Court and the Court of Appeal may of its own motion make an order of committal against a person guilty of contempt of court.**

**iv) The court hearing an application for an order of committal must do so, as a general rule, in public, except where the application relates to, adoption, guardianship, custody and maintenance of an infant, or where proceedings relate to a person suffering from a mental disorder, or where it appears to the court that in the interest of justice or for reasons of national security the application should be heard in private.**

**v) No grounds shall be relied on at the hearing of an application for contempt, except those set out in the statement, or in the claim form or application notice.**

**vi) If the contemnor wishes to give oral evidence on his own behalf, he shall be entitled to do so.”**

Adherence to the procedure for instituting contempt of court proceedings is compulsory-see **Ex-parte EDWARD ALERA t/a GENESIS RELIABLE EQUIPMENT & 2 OTHERS, Supra**, and **ENG KENYA LTD v MAGNATE VENTURES LTD [2009] eKLR**.

The Applicant’s counsel submitted that since leave to commence the proceedings had been granted then this Court has no power to set aside the leave so granted. Counsel for the Applicant therefore implies that this Court has no jurisdiction to consider whether the leave granted is proper. As to whether the Attorney General was served at least a day prior to the filing of the application for leave, the Applicant asserted that this is a matter of evidence and cannot be raised as a preliminary objection. The Applicant further contends that if the rules were not fully complied with then any such non-compliance can be remedied by Article 159(2)(d) of the Constitution so that justice can be administered without undue regard to procedural technicalities.

I am not persuaded by this line of argument. It must be noted that contempt of court is a serious act which attracts punishment including imprisonment. The rules must be strictly complied with for the process may result in loss of liberty for the alleged contemnor. I therefore agree with the statement by Lord Denning M.R in **Re BRAMBLEVALE LTD [1969] 3 All E.R. 1062** that:

**“A 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 reasonable doubt.”**

Failure to comply with rules applicable will therefore lead to the collapse of an application to commit somebody for contempt of court. I do not envisage a situation where Article 159(2)(d) can be interpreted with the consequence that an accused person’s rights to a fair hearing under Article 50 of the Constitution can be overlooked. One of the provisions of Article 50 is the right to be informed of the charge with sufficient details to answer it-see Article 50(2)(b). This is in tandem with the requirement that the notice of motion, accompanied by a copy of the statement and affidavit in support of the application for leave to commence contempt of court proceedings, must be served personally on the person sought to be committed.

Did the Applicant comply with the rules in respect to the first application? The 3<sup>rd</sup> Respondent alleged that the application for leave and the supporting documents were not served on the Attorney General at least a day before the filing of the application. This is a requirement of the rules. The Applicant did not avail evidence that this rule was indeed complied with. Nothing would have been easier than for the Applicant to avail to the Court an affidavit confirming service.

The second complaint by the 3<sup>rd</sup> Respondent is that the notice of motion was not filed within 14 days as required by order 52 Rule 3(2) of the RSC (now the Rules of the High Court). It is not disputed that leave was granted on 8<sup>th</sup> April, 2012 and the notice of motion was filed on 29<sup>th</sup> April, 2012 which was indeed outside 14 days. The said rule provides that if the notice of motion is not filed within 14 days from the date of the grant of leave **“the leave shall lapse.”** It follows therefore that by the time the Applicant was filing the first application, leave had lapsed. The first application therefore fails on the ground that the procedure was not followed before leave was granted on 8<sup>th</sup> April, 2012. Secondly, by the time the application was filed on 29<sup>th</sup> August, 2012 the leave granted had lapsed.

I now turn to the second application. Again, there is no evidence that the application for leave and the supporting documents were served on the Attorney General at least a day before the application was filed. As already explained, failure to comply with the rules for the commencement of contempt of court proceedings is fatal. The second application is also found to be incompetent.

Having found that there are no proper applications before the Court I need not go into the merits of the applications. The net result is that the two applications fail and they are dismissed. Considering the circumstances surrounding the dispute between the Applicant and the 3<sup>rd</sup> Respondent, I will make no order as to costs.

Dated, signed and delivered at Nairobi this 21<sup>st</sup> day of February, 2014

**W. K. KORIR,**

**JUDGE OF THE HIGH COURT**