REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 911 OF 2009

EDWARD NJUGUNA KANGETHE.....PLAINTIFF/ APPLICANT

VERSUS

JOEL KIEMA MUTINDA.....1ST DEFENDANT/RESPONDENT

VIOLET NDANU MUTINDA.....2ND DEFENDANT/RESPONDENT

R U L I N G

1. Before the Court for determination are two applications dated 19th March, 2013 and 7th June, 2013 by the Plaintiff and 1st and 2nd Defendants respectively. The Plaintiff's application is brought pursuant to the provisions of **Section 5 (1)** of the *Judicature Act*, **Order 50 Rule 1** of the *Civil Procedure Rules*, **Order 52 Rule 1(2)** of the *Rules of the Supreme Court of England*, **Section 3A and 63(e)** of the *Civil Procedure Act*. The applicant seeks the following prayers *inter alia:*

> **"1. THAT JOEL KIEMA MUTINDA and VIOLET NDANU MUTINDA be detained in prison for a term not less than six (6) months for contempt of Court as the said JOEL KIEMA MUTINDA and VIOLET NDANU MUTINDA have disobeyed the ORDER of this Honourable Court made on 18th October, 2012, requiring them to deposit Kshs. 80,000/- every month in a joint interest earning account opened in the names of the Advocates for the Plaintiff and those of the 1st and 2nd Defendants, with effect from 31st October, 2012 until the hearing and determination of the suit.**
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> **2. AN ORDER do issue directing the 1st and 2nd Defendants/Respondents to vacate the suit premises forthwith and the same be let out to a 3rd party and the monthly rent thereof be deposited in a joint interest earning account in the names of the advocates on record for the parties.**
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> **3. Any other and/or further order be made in the interest of justice and to enforce the Court Order in this unique circumstances".**

2. The application is predicated upon the grounds as set out in the Application and further by the Applicant's affidavit sworn on even date. The Applicant contends that the issues at hand emanate from a

sale agreement dated 25th September, 2007 for the sale of the suit premises. Subsequent to an alleged breach of contract by the 1st and 2nd Defendants, the Plaintiff instituted a suit against them, culminating with the Court issuing interlocutory orders on 18th October, 2012. The deponent also avers that the 1st and 2nd Defendants, in contempt of Court Orders, have failed and or refused to comply with the same as issued by the Court. Further, it is contended, that despite reminders and a notice of penal consequences, the 1st and 2nd Defendants are unwilling to comply with the Court's Orders, and are subsequently in blatant disregard and disobedience of the same.

3. In opposing the application, the 2nd Defendant swore an affidavit in response on 15th April, 2013. She deposed that she and her husband, the 1st Defendant, are not contemnors, and that the reason that they have been unable to comply with the Court Orders issued on 18th October, 2012 is as a result of the Plaintiff's breach of contract. The deponent averred that the Defendant cannot raise the amount of Kshs. 80,000/- as ordered by the Court as the Plaintiff had rendered them destitute and if the Court allowed the application, such would render them homeless as well.

4. In response to the 2nd Defendant's Affidavit, the Plaintiff swore a Further Affidavit on 3rd July, 2013. The Plaintiff reiterated that the 1st and 2nd Defendants in the said affidavit merely stated that they were unable to raise Kshs. 80,000/- as ordered by the Court, and have not shown or demonstrated their inability to do so to the Court. He further contended that the 1st and 2nd Defendants did not raise SUCH issue with Court at the time the Orders were issued as regards the amount. They had not made any deposits in the joint interest account to date and had not offered any alternative solution to ameliorate the matter. The Plaintiff averred that the 1st and 2nd Defendants were misleading the Court, by alleging that the Plaintiff's application for summary judgment, sought compliance with the Court Order of 18th October, 2012.

5. The Court, in determining issues of contempt, derives its authority from **Section 5(1)** of the *Judicature Act* and **Order 52 Rule 1(2)** of the *Rules of the Supreme Court of England*. The adoption of the rules of the Supreme Court of England is well illustrated in the Court of Appeal case of **Christine Wanjiru Gachege v Elizabeth Wanjiru Evans & 11 Others (2014) eKLR** where the Appellate Court held *inter alia:*

> **"Therefore, today the only statutory basis of contempt of court law in so far as the Court of Appeal and the High Court are concerned is Section 5 of the Judicature Act. In addition, Section 63 (c) of the Civil Procedure Act provides that a disobedience of an order of temporary injunction will attract punishment in the form of imprisonment or attachment and sale of the contemnor's property. Section 28(4) of the Supreme Court Act vests in that court the power to punish for contempt. Of relevance to the matter at hand is Section 5 (1) of the Judicature Act which provides as follows:-**
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> **"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.**
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> **(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."** (Emphasis Supplied). **The emphasis imposes a duty on the High Court, the Court of Appeal and law practitioners to ascertain the applicable law of contempt in the High Court of Justice in England, at the time an application is brought. This duly was noted by H.G. Platt J. and D.C. Porter, Ag J. (as they then were) In the Matter of an Application by Gurbakesh Singh & Sons Ltd Misc. Civil Case No. 50 of 1983, where they said:-**
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> **"The second aspect concerns the words of Section 5 – "for the time being", which appear to mean that this Court should endeavour to ascertain the law in England at the**

> **time of the trial, or application being made. Sometimes it is not known, or may not be known exactly, what powers the court may have. It seems clear that the Contempt of Court Act 1981 of England is the prevailing law and that the procedure is still that set out in order 52 of the Supreme Court Rules."**

6. In the instant application however, leave was granted by this Court on 15th March, 2013 by Kamau, J. The Plaintiff proceeded to file the substantive application seeking for the committal to civil jail of the 1st and 2nd Defendants for breach of the orders of the Court issued on 18th October, 2012 made by Mutava, J. In an application for committal to civil jail, as per the present application, the standard of proof that has to be established is that of "beyond all reasonable doubt", as was held in **Re Bramblevale Ltd [1970] Ch 128**. Neil, LJ in his determination of standard of proof in **Dean v Dean [1987] 1 FLR 517** held *inter alia:*

> **"…it is to be remembered that contempt of court, whether civil or criminal, is a common law misdemeanor. Furthermore, there are many authorities of which the decision in Re Bramblevale Ltd is an authoritative example, to the effect that proceedings for contempt of court are criminal or quasi criminal in nature and the standard of proof to be applied is the criminal standard."**

The Court of Appeal in **Christine Wanjiru Gachege v Elizabeth Wanjiru Evans & 11 Others** (supra), on the strict application of the law, reiterated as follows:

> **"Because in terms of Section 5(2) of the Judicature Act, the court in punishing for contempt exercises ordinary criminal jurisdiction, it is paramount that the procedure for instituting such proceedings be scrupulously followed.'** (Emphasis mine).

7. Section 5 (1) of the *Judicature Act*, as has been illustrated, does not provide for the procedure to be followed, but is adopted from the Rules of the Supreme Court and the 2nd Supplement of the White Book. With regard to such procedure, the Appellate Court in rendering its decision in **Christine Wanjiru Gachege v Elizabeth Wanjiru Evans & 11 Others** (supra) reiterated as follows:

> **"In Republic V. Gachoka & Another Criminal Application No. Nai 2 of 1999, an application for leave was heard and granted on 16th February 1999 by three judges (Kwach, JA, Tunoi, JA, as he then was and Shah, JA). The substantive motion brought pursuant to that leave was heard by 7 judges (Gicheru JA, as he then was (dissenting), Kwach, Omolo JJA, Tunoi, JA, as he then was, Shah, Lakha and Owour, JJA). These decisions were rendered 15 and 20 years ago respectively. Today, in 2014, in considering the question raised in this application, those cases may not provide authority in terms of procedure in instituting an application for contempt. We must therefore ascertain the prevailing state of the law of contempt in England today."**

8. Under the new Rules of the Supreme Court and as contemplated under the 2nd Supplement of the White Book or Civil Procedure Act, and as has been determined by the Appellate Court in **Christine Wanjiru Gachege v Elizabeth Wanjiru Evans & 11 Others** (supra), no notice and leave is required before the substantive application can be made against parties. However, of note, and concern in the present case, is whether there was need to effect personal service upon the 1st and 2nd Defendants of the application as contemplated in **Awadh v Morumbu [2004] 1 KLR**, the authority cited by the 1st and 2nd Defendants. In **Highlands Plant Ltd v Alice Wairimu Mwangi (2005) eKLR** and **Monica Waithera Munyua v Joshua Sorora & 3 Others [2005] eKLR** the Court held that personal service of the Court Order and the penal notice is mandatory. In both instances, the applications for committal to civil jail were dismissed for failing to comply and adhere to the provisions of **Section 5** of the *Judicature Act*, as read together with **Order 39 Rule 2** of the *Civil Procedure Rules*. These provisions are unequivocal and mandatory, and any applicant who wishes to bring contempt proceedings must adhere and comply with such set down procedure.

9. In the Replying Affidavit of the 2nd Defendant dated 15th April, 2013 at paragraph 4, she clearly

reiterated that she, as well as the 1st Defendant, had appealed the Orders of Mutava, J issued on 18th October, 2012. She goes further to state that the predicament that she and the 1st Defendant find themselves in is due to the breach of contract by the Plaintiff, and they have therefore, been unable to comply with the Court Orders as issued. Attached thereto is the Notice of Appeal dated 18th October, 2012, lodged on the very same day that the Court issued its Orders. By inference, therefore, it may be deduced that both parties, i.e. the 1st and 2nd Defendant were aware of the Court Orders as issued on 18th October, 2012, which led them to take immediate action by filing a Notice of Appeal against the Orders of Mutava, J.

10. The service of the Order of the Court and penal notice is strictly procedural, as has been reiterated hereinabove in **Highlands Plant Ltd v Alice Wairimu Mwangi** and **Monica Waithera Munyua v Joshua Sorora & 3 Others** (supra) and is mandatory in such proceedings. The question that arises, however, is whether service has to be effected personally, or whether service through the Advocates on record for the 1st and 2nd Defendants is sufficient. On the issue of personal service as the 1st and 2nd Defendants were aware of the Court Orders issued on 18th October, 2012 (as evidenced by their Notice of Appeal), Lenaola, J in **Basil Criticos Vs Attorney General and 8 Others [2012] eKLR** stated that :-

> **"...the law has changed and as it stands today knowledge supercedes 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."**

It is explicitly evident, however, that personal service was effected upon the 2nd Defendant as stated in the Affidavit of Service of one **Festus Mutua** sworn on 28th January, 2013. That Affidavit goes on at length to explain how the process server was able to serve the 2nd Defendant at the suit premises. In the submissions by the 1st and 2nd Defendants dated 24th July, 2013 at page 2, it is also further admitted that indeed service was effected personally on the 2nd Defendant. It was submitted therein:

> **"The application was not served upon the Respondents directly. It was served upon their advocates. The law requires that service should be upon the contemnors personally. *In fact the service of the order is admitted to have been done upon the 2nd Respondent only*. As at now, the 1st Respondent has not been served with the Order. The application is defective to that effect".**

11. It would be assumptive at this stage, for the Court to contemplate as to whether the 1st Defendant was indeed aware of the said Court Orders. In the *Civil Procedure (Amendment No. 2) Rules 2012*, in the *Schedule Applications and Proceedings in Relation to Contempt of Court*, **Rule 81.5** as read together with **Rule 81.6** provides for service of the Order to be made personally. **Rule 81.5(1)** reads:

> **"Unless the court dispenses with service under rule 81.8, *a judgment or order may not be enforced under rule 81.4 unless a copy of it has been served on the person required to do or not do the act in question, and in the case of a judgment or order requiring a person to do an act*–**

At **Rule 81.6** it is provided that:

> **"Subject to rules 81.7 and 81.8, copies of judgments or orders and *any orders or agreements fixing or varying the time for doing an act must be served personally*."** (Emphasis mine).

12. As a result, this Court distinguishes the determination of my learned brother Lenaola, J in **Basil Criticos Vs Attorney General and 8 Others** (supra) as regards the mode of service in relation to an application for contempt. The Rules of the Supreme Court as provided under **Rule 81.5** and **81.6** as read are mandatory obligations that courts must follow in applications for contempt of its orders. As reiterated

by Ringera, J (as he then was) in **Microsoft Corporation Ltd & Another v Mitsumi Computer Garage (2001) KLR 470**, procedure is the handmaiden of justice. Further, in **Hunker Trading Co. Ltd v Elf Oil Kenya Ltd (2010) eKLR** the Court of Appeal reiterated that the "oxygen principles" as provided under **Sections 1A and 1B** of the *Civil Procedure Act* should not be used as a panacea for all ills and situations. The rules of procedure exist in tandem with the law to provide a formal mechanism where justice can be attained and dispensed expeditiously, fairly and without delay. Procedure is purposive, and supplements the Courts in exercising their authority and in the dispensation of justice. In contempt proceedings, the contemnor as hereinabove reiterated, has to be personally served with the Order and penal notice. **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others** (supra) by which this Court is bound, succinctly determines such. The 1st Defendant was not served, and the Affidavit of Service of **Festus Mutua** is silent on the issue. The Court can only assume that the 1st Defendant was not personally served.

13. It is an obligation for every person against whom, or in respect whom, an order is made to obey it. This is reiterated in **Hadkinson v Hadkinson (1952) 1 All E.R 567**. It was held by Romer, L. J *inter alia*;

> **"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.'** (Emphasis mine).

The 2nd Defendant has demonstrated her disobedience of the Court Order by alleging that she (as well as the 1st Defendant), was unable to obey the Order as the Plaintiff had put both of them in the predicament that they were now in. To the Court, this explanation is not only for fetched, but smacks of mischief on the part of the Defendants. Failure to obey the Court Order as issued by Mutava, J on 18th October, 2012, notwithstanding the explanation for the failure to obey, is contemptuous and the Court is empowered under the provisions of the law, to punish a contemnor. Committal to civil jail is a remedy available under our statutes and as long as proper procedures are followed, without any abuse, then such is legitimate.

14. Taking all circumstances in consideration, the upshot is that the Court hereby finds that the 2nd Defendant, knowingly and willfully, disobeyed this Court's Order issued on 18th October, 2012. The Court hereby finds the 2nd Defendant in contempt of that Order and she is hereby sentenced to thirty (30) days in civil jail commencing immediately. As far as the 1st Defendant is concerned, he can count himself lucky to not suffer the same fate as his wife only escaping therefrom as a result of his not being served personally with Mutava J's said Order. **Order 2** of the application is disallowed. Orders as issued by the Court on 18th October, 2012 are preserved.

15. The second application for determination by this Court is brought by the 1st and 2nd Defendant pursuant to the provisions of **Order 42 Rule 6** of the *Civil Procedure Rules*. The applicants seek the following prayers inter alia:

> **"1. THAT this application be certified urgent and heard immediately and *ex-parte* in the first instance;**
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> **2. THAT there be a stay of execution of this Court's ruling and orders dated 18th October, 2012 pending the hearing and determination of this application.**
>
> **3. THAT there be a stay of execution of this Court's ruling and orders dated 18th October, 2012 pending the hearing and determination of Court of Appeal Civil Appeal No. 98 of 2013;**
>
> **4. THAT the costs of this application be provided for".**

16. The application is supported by the Affidavit of the 2nd Defendant **Violet Ndanu Mutinda** sworn on 4th June, 2013 and the grounds as predicated in the application. The 2nd Defendant contends that the application is brought without undue delay, and that the 1st and 2nd Defendants stand to suffer substantial loss, and the appeal filed rendered nugatory, if the orders as prayed for are not issued. Further, the 2nd Defendant avers that the Defendants have filed an appeal, being **Civil Appeal No. 98 of 2013**.

17. In opposing the application, the Plaintiff filed his grounds of opposition dated 27th June, 2013. The Plaintiff maintained that the application as being incompetent as it is brought principally to circumvent and evade the contempt proceedings and that the application is an abuse of the process of the Court being made in bad faith. He also contended that the application has been brought with unreasonable and inordinate delay and that there is no irreparable loss that the 1st and 2nd Defendants stand to suffer by obeying the Court order that they now seek to be stayed. Further, the Plaintiff swore an affidavit in reply on 14th November, 2013 reiterating the contents of the Grounds of Application. It is contended that the intended Notice of Appeal was served six (6) months after the date of the said Ruling of Mutava J and was thus inordinately and unreasonably delayed and further, that the Record of Appeal was served out of time.

18. The applicants seek the equitable and discretionary relief of stay of execution pending the hearing and determination of their appeal, being **Civil Appeal No. 98 of 2013**. They have relied on **Order 42 Rule 6 sub-rule (2)(a)** of the *Civil Procedure Rules* which reads:

> **"No order for stay of execution shall be made under subrule (1) unless—**
>
> a. **the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and …".**
> b.

19. The applicants making an application to Court under the provisions of **Order 42 Rule 6** have to establish that they stand to suffer substantial loss and that the application is made timeously and without unreasonable delay. As regards substantial loss, Musinga,J (as he then was) in **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001** found that:

> **"...substantial loss" is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum."**

In **Mukumu v Abuoga (1988) KLR 645** on the issues of substantial loss, the learned judges held:

> **"…the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."**

This Court on 18th October, 2012 issued orders as follows:

> **"In the upshot, the Plaintiff's Notice of Motion dated 18th June, 2012 is hereby allowed with costs to the Plaintiff. The 1st and 2nd Defendant are hereby ordered to deposit the sum of Kshs. 80,000/- every month in a joint interest earning account opened in the names of the advocates for the Plaintiff and those of the 1st and 2nd Defendants effective from 31st October, 2012 until the hearing and determination of the suit."**

20. The 1st and 2nd Defendants' contention is that they stand to suffer substantial loss if the Court Order as issued on 18th October, 2012 is not stayed. The monies that the Court ordered to be paid were to be

deposited in a joint interest earning account. As reiterated in **Mukumu v Abuoga** (supra), the purpose of a stay order is to maintain and preserve the status quo in order to ameliorate any losses that may be incurred should the appeal succeed or be dismissed. The 1st and 2nd Defendants depositing Kshs. 80,000/- per month to my mind, does not constitute irreparable loss to warrant a stay of the Court's Order. In the event that they succeed on appeal in the setting aside of this Court's Order, the monies deposited in the joint interest earning account would revert to them. The fact of the matter is that there is no loss as the Defendants have failed to deposit any monies as ordered by Court.

21. The second ambit of the application is that it has to be made without unreasonable delay. The Order was issued by the Court on 18th October, 2012, with the Notice of Appeal being filed on 22nd October, 2012. The Notice was lodged on 8th May, 2013 and the Memorandum of Appeal filed on 14th May, 2013. The Certificate of Delay issued pursuant to the provisions of **Rule 81** of the *Appeal Rules*, detailed that the typed proceedings were ready by 21st February, 2013 and were paid for by the 1st and 2nd Defendants on 7th March, 2013. Under **Order 42 Rule 6 (5)**, the 1st and 2nd Defendant could have informally made an application for stay of execution pending appeal, pending their formal application. From the proceedings on record, no informal application under sub-rule (5) had been made. The application for stay comes over nine (9) months following the determination and subsequent Order of the Court. Such delay has not been explained as to why the application was not made earlier. The 1st and 2nd Defendants' contention is that the application was made timeously and only sixteen (16) days after the lodging of the appeal. However, under the provisions of **Order 42**, nowhere is it stated that an application for stay of execution pending appeal need be made only after the appeal has been lodged. Pursuant to **Rule 6(5)**, the 1st and 2nd Defendant should have made an informal application for stay, and, following the directions of the Court, file a formal application seeking stay orders. Mabeya, J in **Kenya Tanzania Uganda Leasing Co. Ltd v Mukenya Ndunda [2013] eKLR** found as follows:

> **"…I also note that the Plaintiff has indicated that she stands to suffer prejudice that will be occasioned by the further delay in realizing the fruits of litigation. As I stated in the case of** KENYA COMMERCIAL BANK LIMITED Vs SUN CITY PROPERTIES LIMITED & 5 OTHERS [2012] eKLR **"in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced."** (Underlining mine).

22. For me, the balance of convenience in this instance would tilt in favour of the Plaintiff. The 1st and 2nd Defendants have wilfully and knowingly disobeyed the Court Order issued on 18th October, 2012. It is the Plaintiff's contention that as contemnors, they should first purge their contempt and then apply for stay. This would be in line with the decision made by Hayanga, J in **Gladys Momanyi v Dr. George Omondi Oyoo & 4 Others Civil Case No. 1445 of 2001 (U.R)** cited by the Plaintiff in which the learned Judge held:

> **"It would appear in a situation like this that applicant first ought to purge his contempt then apply for stay or show on merits that the contempt is justified by reason that unproportionate damage would incur to him if he was made to obey the Court order without a stay being granted or that it is illegal."**

The Court will not turn a blind eye and allow a contemnor, as elucidated in **Gladys Momanyi v Dr. George Omondi Oyoo & 4 Others** (supra), to have its discretion and authority capriciously and wantonly applied in aid of the wrong doer.

23. In light of the foregoing, and in exercise of the authority conferred upon this Court pursuant to **Section 3A** of the *Civil Procedure Act*, I find that the application dated 7th June, 2013 by the 1st and 2nd Defendants is undeserving and lacks merit. The same is hereby dismissed with costs to the Plaintiff/Respondent.

DATED and delivered at Nairobi this 1st day of April, 2014.

J. B. HAVELOCK

JUDGE