



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO.130 OF 2013

BETWEEN

CALLEN NYAMOITA KENYATTA1ST APPELLANT

GEORGE MARTIN KENYATTA 2ND APPELLANT

AND

EDWIN MOMANYI KENYATTA 1ST RESPONDENT

MELCHZEDECK KENYATTA 2ND RESPONDENT

(Being an appeal from the ruling delivered by Hon. John Njoroge on

25th September 2013 in Nyamira CMCC No.141 of 2013)

RULING

1. By an application dated 8th October 2013 by way of Notice of Motion pursuant to **Order 40 Rule 3 (1), (2) and (4)** of the **Civil Procedure Rules** and **Section 63 (c)** of the **Civil Procedure Act Cap 21 Laws of Kenya** the applicants/appellants seek the following orders:-

1. Spent.
2. *That the Respondents be cited for disobeying and disregarding the lawful orders of this court issued on the 2nd day of October 2013 and be committed to prison and their property be attached and sold to the extent that the court will order.*
3. *That the Respondents be required to purge the disobedience of the court order dated 2nd October 2013 by exhuming the remains of the deceased Joseph Kenyatta Omambia interred within Tente Village Bonyamatuta Chache Location in Nyamira County.*
4. *That the Officer Commanding Station Nyamira Police station and the Public Officer of Health Nyamira County be directed to ensure that the order above (2) is undertaken to the required standards.*
5. *That the Respondents do pay costs of this application.*

2. The application is premised on the grounds set out on the face of the

application and supported by the affidavit of George Martin Kenyatta. In the affidavit he contends that the orders granted by this court on the 2nd day of October 2013 and served upon the Respondents were openly disregarded and/or disobeyed and that the Respondents ought to be

punished for disobeying the said orders.

3. The application is opposed by the two Respondents who have sworn replying affidavits both dated the 14th day of October 2013 in which they have denied having been served with the court order. The application is also opposed vide the Notice of Preliminary Objection dated 17th October 2013 on grounds as follows:-

1. ***THAT*** the appellant's application dated 8th October, 2013 offends **Section 5 of the Judicature Act, Cap 8, Laws of Kenya AND Order 45 and 52 of the Rules of the Supreme Court of England.**
2. ***THAT*** no leave has been sought or obtained *ex parte* to anchor commencement of contempt proceedings against the respondents as provided for or envisaged in **Rule 2 (3) of Order 52 of the Supreme Court of England** to which **Section 5 (1) of the Judicature Act, Cap 8 Laws of Kenya** is substantively and procedurally anchored and or underpinned.
3. ***THAT*** no statement setting out grounds on which committal for contempt is sought, verifying affidavit thereto were filed preceding the instant application dated 8th October, 2013.
4. ***THAT*** no notice was served or issued upon the Registrar of the High Court of Kenya of intent to file the application a day before the Applicants filed the application for contempt against the respondents.
5. ***THAT*** the contempt proceedings herein were commenced prematurely, impetuously, unprocedurally and in flagrant breach of the law.
6. ***THAT*** no Notice of intention to commence contempt proceedings was served on or issued to the Attorney General the proceedings herein being of a Penal nature.

4. Parties thereafter agreed to proceed with the application by way of written submissions. The submissions were duly filed and exchanged.
5. On the 10th February 2014 this matter came up for highlighting of submissions. Mr. Minda for the Applicants submitted that the only known legal instrument to confirm service of court process is an affidavit of service under **Order 5 Rule 15 (1) of the Civil Procedure Rules**. Once that document is filed in court and if it is in compliance with the rules the court need not look anywhere else to confirm service. Once a party disputes service he must move the court for summons to bring before the court the process server and any other person who conducted the service to come before court for cross examination.
6. He submitted further that the opportunity to cross examine the process servers had been squandered by the respondents, thereby leaving the affidavit of service to confirm that service was effected. In conclusion Mr. Minda submitted that the applicants herein were properly served and having disobeyed the orders they ought to be punished. He urged the court to grant the orders sought.
7. Mr. Mose in response submits that the respondents are categorical that

they were never served and therefore denied the opportunity to obey the court's order. He adds that the application herein is ill motivated and that if the Respondents had been served they would have obeyed the orders. He submits that service must be proved and that the affidavit of service is so convoluted that it does not show that service was effected.

8. He submits further that the instant application is incompetent and that the jurisdiction of this court to punish for contempt is anchored in **Section 5 (1) of the Judicature Act** and not in any other provision of the law. He has relied on the case of **John Mugo Gachuki –vs- New Nyamakima Co. Ltd. Nairobi HCCC No.456 of 2011** where Justice Odunga observed that the jurisdiction of the High Court is same as in England and there ought to be leave before commencing contempt proceedings. He submits that this was not done as applicants proceeded under **Order 40 and 42 of the Civil Procedure Rules** and **Section 63 of the Civil Procedure Act**. Counsel contends that the jurisdiction under the Civil Procedure Act is for the lower court and not for this court and therefore the instant notice of motion is substantially and procedurally incompetent.
9. Secondly he argues that contempt proceedings assume a criminal angle which of necessity enjoins the applicant to demonstrate that the orders in issue are served. He submits that from the affidavit

- of 2nd Respondent he had not arrived in Kisii as alleged on the date of service. 1st Respondent also says on the material day he had travelled to Nairobi to collect the body of the deceased.
10. Counsel holds the view that in the circumstances the application before court is not intended to protect the dignity of the court but to invite the honourable court to join in a family feud. He further submits that if the applicants wanted to protect the dignity of the court proper legal procedure would have been followed in effecting service of the order upon the respondents and in bringing this application.
 11. He adds that the Respondents have stated passionately that they respect and obey court orders. Further that the affidavit of service shows that the process server served persons who were not meant to be served and also left the documents with some friend of the respondents.
 12. He further submits that the allegation of contempt is a serious issue which borders on criminality so that evidence of service must be crystal clear and cogent. That the process server said that he knew the 1st Respondent and that being so one wonders why he had to look for someone else to help him effect service.
 13. He urges the court to exercise discretion in a manner that will uphold the dignity of the court and to find that the affidavits of service are casual in their approach without bringing out the fact of service. Further that the Notice of Motion as filed is incapable of convincing this court to exercise jurisdiction to punish for contempt. He also asks court to consider the authorities in determining this matter.
 14. It is noted that the Respondents are children of the deceased while the applicants are wife and son of the deceased.
 15. **Section 5 of the Judicature Act** provides *“that 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 the subordinate courts.”*
 16. The fact that the Judicature Act does not provide for either substantive or procedural law that governs contempt of court proceedings has been a point of expression of complaint as expressed in the case of **John Mugo Gachuki –vs- New Nyamakima Co. Ltd.**(supra) where it was stated thus:-

“It is unfortunate and regrettable that nearly 50 years after independence our procedure with respect to punishment for contempt in our court is referable` `` to the procedure in the High Court of Justice in England. It is saddening that the entities entrusted with updating and drafting our laws have not seen the urgency of enacting our own law relating to such an important aspect of the rule of law. That being the position ours is not to enact law but to interpret the law enacted.”

I entirely agree with Mr. Justice Odunga's above stated sentiments and note that without such legislation in our laws we must adhere to what is provided for. It is therefore settled that the law that governs contempt proceedings in Kenya is the one applicable in England.

17. **Order 52 Rule 2 of the Rules of the Supreme Court of England** provides:-

“(i) No application for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.

(ii) An application for such leave must be made ex parte to a judge and must be supported by a statement setting out the name and description of the applicant, the name description and address of the person sought to be committed and the grounds on which his

committal is sought and an affidavit to be filed before the application is made verifying the facts relied upon.

(iii) The applicant must give notice of the application for leave not later than the preceding day to the Registrar and must at the same time lodge with the registrar copies of the statement and affidavit.”

18.I have had the chance of going through the court record herein and especially the application and the submissions made by counsel. The applicants herein did not seek leave of the court by an ex parte chamber summons as is required before bringing the contempt proceedings. They have not complied with the procedure of bringing contempt proceedings as it is a requirement that an ex parte application be filed supported by a verifying affidavit, statement relied on which sets out the name and description of the applicant name and description of the contemptor and grounds upon which committal is sought. Further it is also a requirement that an applicant gives a notice of the application for leave to the Registrar a day preceding the date of the application.

19.In the case of **Republic –vs- The Attorney general Ex-parte Bindi A. Gagnia Kisumu HC Misc. No.124 of 2005** Mwera J (as he then was) persuasively stated thus:-

“The application for leave which should precede the substantive motion fell foul of the law when the application was not notified to the Registrar a day before its hearing. All above proceeds on the basis that the Divisional Court in England has its counterpart in the High Court here while the Crown Office should be equated to the Registrar’s Office ... Failure to do what the law requires cannot be described as slight procedural mis-steps. They were/are fundamental in the sense that committal proceedings are about a person’s liberty.”

This issue was also considered in **Petra Jailiane Muller –vs- Saidha Lewa Muyo Foundation (NGO) Civil Appeal NO.51 of 2006** (Malindi) where Omondi J stated thus:-

“The equivalent of the crown office in the Kenyan set up would be the Attorney General’s Office.”

Odunga J. also concurred that the Crown Office in this country is the Attorney General’s Office see – **John Mugo Gichuki case** (supra).

20.In the instant case, there is nothing to show that the notice of intention to commence proceedings was served upon the Registrar of this Honourable Court as is required by the rules. The need to serve is informed by the fact that contempt proceedings are special proceedings that are quasi-criminal in nature that is why the law must be applied to the letter. The requirements in this case were flouted.

21.Having stated the above, I am also not convinced that there was personal service of the court order dated 2nd October 2013 upon the Respondents as is being alleged. The affidavit of service is ambiguous and not clear.

22.I find that the application herein lacks merit and the same is dismissed. Each party shall bear their own costs.

Dated and delivered at Kisii this 31st day of July, 2014

R.N. SITATI

JUDGE

In the presence of:-

Mr. Minda for the Appellants/Applicants

Mr. Mageto h/b for Nyambega Mose for the Respondents

Mr. Bibu - Court Clerk